

Washington International Law Journal

Volume 12 | Number 2

3-1-2003

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Recommended Citation

David Whedbee, Comment, *The Faint Shadow of the Sixth Amendment: Substantial Imbalance in Evidence-Gathering Capacity Abroad under the U.S.-P.R.C. Mutual Legal Assistance Agreement in Criminal Matters*, 12 Pac. Rim L & Pol'y J. 561 (2003).

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THE FAINT SHADOW OF THE SIXTH AMENDMENT: SUBSTANTIAL IMBALANCE IN EVIDENCE-GATHERING CAPACITY ABROAD UNDER THE U.S.-P.R.C. MUTUAL LEGAL ASSISTANCE AGREEMENT IN CRIMINAL MATTERS

David Whedbee[†]

Abstract: Transnational organized crime has an adverse impact on the United States and the People's Republic of China. In the last thirty years, the mutual legal assistance agreement has emerged as an effective mechanism to streamline international judicial assistance in combating borderless crime. The accretion of these agreements has created a growing web of bilateral obligations that links sovereign jurisdictions. The U.S.-P.R.C. mutual legal assistance agreement (the "U.S.-P.R.C. MLAA") furthers U.S. interests by facilitating U.S. Attorneys' access to physical evidence and witnesses in the People's Republic of China. Significantly, the political offense exception in the U.S.-P.R.C. agreement permits U.S. authorities to avoid complicity in Chinese prosecutions of political dissidents and religious minorities. Missing from these arrangements, however, is consideration of U.S. constitutional safeguards that should accompany the expanded power of U.S. law enforcement abroad. While prosecutors can exchange evidence directly under the U.S.-P.R.C. MLAA, defendants must resort to discretionary access to evidence abroad under the antiquated letters rogatory system. This imbalance may infringe on the defendant's right to compulsory process. Given the very broad "state secrets" exception under Chinese law, defendants may be unable to obtain exculpatory evidence from the People's Republic of China. The defendant's right to confrontation may also be compromised in the Chinese context. The widely acknowledged Chinese police practice of coercion of the accused and incarcerated may stifle truthfulness, undermining the genuine opportunity for defense counsel to reliably cross-examine a Chinese witness in police custody. By allowing defendants in U.S. criminal proceedings more reliable access to evidence in the People's Republic of China under the U.S.-P.R.C. MLAA framework, the protection of U.S. constitutional rights to compulsory process would be enhanced.

I. INTRODUCTION

On June 19, 2000, Gen. Barry McCaffrey, Director of the White House Office of National Drug Control Policy, announced the signing of an Executive Agreement between the United States and the People's Republic of China Concerning Mutual Legal Assistance in Criminal Matters ("the U.S.-P.R.C. MLAA").¹ Now known as the "McCaffrey Announcement,"

[†] The author would like to thank Professor John Junker for his comments, and Professor James W. Whedbee, and Sandra Hughes for their unwavering support. Any errors or omissions are the author's own.

¹ Agreement on Mutual Legal Assistance in Criminal Matters, June 19, 2000, U.S.-P.R.C., (unpublished) (on file with U.S. Dept. of State, Office of Treaty Affairs) [hereinafter U.S.-P.R.C. MLAA]. See *Drug Control Policy Chief on U.S.-China Agreement: U.S., China Sign Mutual Legal Assistance*

the declaration stressed "the common threat" of heroin and methamphetamine addiction facing both countries, and the formation of the Sino-American Joint Liaison Group² as an initial "door leading to a wider cooperation against drugs."³ The McCaffrey Announcement signaled a resumption of closer Sino-American cooperation on criminal matters since the informal judicial assistance in "Operation Goldfish"⁴ that led to the diplomatic debacle in *Wang v. Reno*.⁵

The *Wang* case exposed coercive practices used in the Chinese criminal justice system to influence a witness who was eventually transferred to the United States to testify.⁶ For apparent political reasons, the agents of the Chinese Ministry of Public Security ("MPS") tortured Wang until he gave a false statement that the heroin at issue in "Operation Goldfish" had originated in Hong Kong, and not People's Republic of China ("P.R.C.").⁷ Because U.S. Drug Enforcement Agency ("DEA") operatives knowingly overlooked evidence of coercion, once on the stand, Wang was put in the intolerable position of perjuring himself or truthfully testifying at the risk of execution upon return to the P.R.C.⁸ Accordingly, the federal

Agreement, at <http://www.usinfo.state.gov/regional/ea/uschina/McCaffrey.htm> (last visited Jan. 14, 2003) [hereinafter McCaffrey Announcement].

² Following the 1997 U.S.-China Summit, the Joint Liaison Group was formed to promote cooperation in the field of law. See United States Information Service, *Washington File*, released June. 27, 1998, available at <http://usembassy-australia.state.gov/hyper/WF980629/epf104.htm> (last visited Feb. 2, 2003). The McCaffrey Announcement was made at the fourth Joint Liaison Group meeting. See McCaffrey Announcement, *supra* note 1.

³ McCaffrey Announcement, *supra* note 1.

⁴ "Operation Goldfish" commenced when Drug Enforcement Agency ("DEA") officials learned that authorities in Shanghai had intercepted a shipment of heroin concealed in the cavities of goldfish bound for San Francisco. See *Wang v. Reno*, 837 F. Supp. 1506, 1514 (N.D. Cal. 1993), *aff'd*, 81 F.3d 808 (9th Cir. 1996). The subsequent sting operation involved a beeper placed in the shipment by Chinese Ministry of Public Security ("MPS") agents that culminated in the arrests of Chico Wong in the United States, Leung Pak Leung in Hong Kong, and Wang Zong Xiao in Shanghai. *Id.* at 1512-1514. In an unprecedented act of judicial cooperation, Wang, also under indictment in the P.R.C. for his role, was transferred to the United States to testify against Leung, the alleged "mastermind" from Hong Kong. *Id.* at 1534, 1537. See also 9th Circuit Grills Prosecutors on Human Rights Issues Surrounding Chinese Witness in "Goldfish" Drug Case, 11, No. 5 INT'L ENFORCEMENT L. REPT. (May 1995).

⁵ The *Wang* case created a diplomatic debacle that chilled Sino-American judicial cooperation until 1998, when the Central Intelligence Agency ("CIA") established a secret electronic surveillance post along the Chinese-Burmese border to track smuggling operations. See *China and U.S. Resume Unprecedented Drug Enforcement Cooperation*, 14, No. 12 INT'L LAW ENFORCEMENT REPT. (Dec. 1998). The CIA set up a secret operations fund, a law enforcement liaison group, and prospective real-time e-mail information exchange on drug trafficking and traffickers. *Id.*

⁶ *Wang*, 837 F. Supp. at 1511-14.

⁷ *Id.* at 1513.

⁸ *Id.* at 1551. "If the Court does not invoke its equitable powers to remedy the constitutional abuses discussed herein, Wang will receive the harshest possible treatment upon his return to the [P.R.C.]; in all likelihood, the Chinese government will execute him for his attempt to vindicate his constitutional rights in this country." *Id.* at 1563.

district court found prosecutorial misconduct⁹ that violated the witness' right to substantive due process.¹⁰

The *Wang* case demonstrated the importance of a neutral court's capacity to exercise its supervisory powers to protect a witness and to ensure that witness testimony in U.S. proceedings is free of the taint of coercion.¹¹ More generally, *Wang* demonstrated some of the problems of gathering evidence extraterritorially when two incongruous criminal justice systems are involved. The bilateral mutual legal assistance treaty ("MLAT") has emerged in the last three decades as a mechanism to accommodate such structural disparities.¹² MLATs provide a framework for prosecutors to overcome specific legal barriers in another jurisdiction that hinder the process of obtaining evidence abroad.¹³ The magnitude of transnational organized crime faced by the United States and the P.R.C. warrants the enhanced prosecutorial power gained by such an MLAT.¹⁴ Because the United States has signed MLATs with other East Asian nations known to harbor or produce organized crime groups, international judicial engagement with the P.R.C. is an expected course.¹⁵

⁹ The court found that, among other breaches of duty, DEA agents ignored clear indications of P.R.C. police coercion, failed to consider videotape evidence of torture, failed to prepare P.R.C. officials accompanying Wang for cross-examination, and lied to the court about knowledge of mistreatment. *Id.* at 1551-58.

¹⁰ *Id.* at 1551. The court ruled that the prosecution's indifference to Wang's dilemma amounted to gross negligence that "shocked the conscience." *Id.* (relying on standard enunciated in *Rochin v. California*, 342 U.S. 165, 172 (1952)).

¹¹ Prior to Wang's testimony, defense counsel had asked Wang about his treatment in Chinese prison, to which Wang replied, as instructed by his Chinese custodians, that his treatment was "fair." *Id.* at 1535. Discovery that an MPS agent had taken notes of Wang's interrogations in Shanghai prompted defense counsel to give notice of his intention to cross-examine Wang about possible coercion in Shanghai. *Id.* at 1535-36. After testifying at trial twice in the presence of his Chinese custodians that Leung was present at the heroin purchase (consistent with the MPS agents' instructions), Wang reversed himself and testified that the defendant was not present at the sale. *Id.* at 1537.

¹² See generally ETHAN A. NADELMANN, *COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. LAW ENFORCEMENT* 323-96 (1993). These agreements may be treaties requiring Senate ratifications [hereinafter MLAT's], precursor mutual legal assistance agreements eventually submitted to the Senate for treaty ratification [hereinafter MLAA], or executive agreements on mutual legal assistance in criminal matters not requiring Senate approval [hereinafter also MLAA]. "MLAT" is a generic reference used in this Comment. See discussion *infra* Part III.

¹³ See Abraham Abramovsky, *Prosecuting the "Russian Mafia": Recent Russian Legislation and Increased Bilateral Cooperation May Provide the Means*, 37 VA. J. INT'L L. 191, 207 (1996). See also discussion *infra* Part III.

¹⁴ See JOHN KERRY, *THE NEW WAR: THE WEB OF CRIME THAT THREATENS AMERICA'S SECURITY* 53, (1997); Niall Fraser, *Triads Stake Claims in Mainland Goldrush*, SOUTH CHINA MORNING POST, July 18, 2002, at 3; Damien McElroy, *Beijing Declares War As Triads Fuel Crime Wave*, THE SCOTSMAN, Feb. 23, 2001, at 14. See also discussion *infra* Part II.

¹⁵ The United States currently has MLATs with the Philippines, Thailand, South Korea, Hong Kong, and Russia. See MICHAEL ABBELL, *OBTAINING EVIDENCE ABROAD IN CRIMINAL CASES*, app. C, A-45 (2002).

Missing from these MLAT arrangements, however, is the consideration of U.S. constitutional safeguards that should also accompany the flexed power of U.S. law enforcement abroad. Significantly, MLATs generally bar "private persons" (i.e. defendants) from utilizing this streamlined process of gathering evidence outside U.S. jurisdictions.¹⁶ As the U.S. Department of Justice ("DOJ") increases its jurisdictional reach through an expanding web of MLATs, defendants must be afforded comparable access to evidence to ensure fundamental trial fairness. The U.S.-P.R.C. MLAA exemplifies this constitutional deficiency inherent in the MLAT framework.

Part II provides a general background of transnational organized crime, assessing the threat of organized crime in the United States and the P.R.C. Part III examines the structure of the MLAT as a tool for obtaining evidence abroad. It discusses the process of harmonization of international law enforcement through an expansion of U.S. MLATs, both to prosecute crime and to accommodate disparate criminal justice systems in a consistent procedural framework. Part IV presents the substance and scope of the U.S.-P.R.C. MLAA, with special attention to the agreement's "political offense" exception to judicial assistance.

Although MLATs are an appropriate response to transnational crime, this Comment contends in Part V that the purported "harmonization" of Sino-American law enforcement efforts is imbalanced, leaving the evolution of an MLAT doctrine incomplete.¹⁷ In particular, the U.S.-P.R.C. MLAA fails to account for the weakening of constitutional safeguards in U.S. criminal proceedings resulting from such Sino-American cooperation. First, defendants are barred from direct use of the MLAT,¹⁸ which forces them to resort to the unpredictable letters rogatory approach.¹⁹ The right to compulsory process of witnesses under the Sixth Amendment to the U.S. Constitution may thus be compromised.²⁰ Without recourse to the streamlined MLAT procedure now reserved for prosecutors, the very

¹⁶ See discussion *infra* Part IV.B.

¹⁷ Harmonization is an evolution of international legal mechanisms that incorporates three component processes: regularization of relations among law enforcement officials in day-to-day practice, accommodation of central structural differences between sovereign systems through MLATs, and homogenization of statutory schemes toward a common norm. NADELMANN, *supra* note 12, at 10-11. See also discussion *infra* Part III.C.

¹⁸ Like many MLATs, the U.S.-P.R.C. MLAA does not provide for use by "private persons" (i.e. defendants). See discussion *infra* Part IV.B.

¹⁹ The letters rogatory process places a number of discretionary hurdles on the defendant by requiring that formal requests be submitted through diplomatic channels to a foreign court, which, at its discretion, may issue orders to the appropriate foreign authority to produce the requested evidence. See ABBELL, *supra* note 15, § 3-3, at 6. See Part III.A *infra* for discussion of letters rogatory.

²⁰ See discussion *infra* Part V.A.

efficacy of an agreement with the P.R.C. exposes an imbalance between the prosecution's and defendant's access to evidence abroad. Second, this limited access to evidence heightens the defendant's need to adequately confront U.S. government witnesses. If the P.R.C. authorities do not transfer a witness to testify in a U.S. proceeding, the opportunity for defense counsel to cross-examine a Chinese witness during a foreign deposition may not comport with the Confrontation Clause of the Sixth Amendment. The threat of coercion in the P.R.C. criminal justice system, as exhibited in the *Wang* case, may stifle truthfulness even if formal requirements for foreign depositions are met under the Federal Rules of Criminal Procedure and current applicable U.S. circuit court rulings.²¹ By allowing defendants in U.S. criminal proceedings more reliable access to evidence in the P.R.C. pursuant to the U.S.-P.R.C. MLAA, the preservation of U.S. constitutional rights to compulsory process and confrontation would be enhanced.²²

II. THE NATURE AND THREAT OF TRANSNATIONAL ORGANIZED CRIME AFFECTING THE UNITED STATES AND THE PEOPLE'S REPUBLIC OF CHINA

In contemporary China, a resurgence of organized criminal activity has accompanied the sweeping economic liberalization which has occurred since the Deng era.²³ The spectrum of Chinese organized crime groups includes a mixture of traditional secret societies (known as "Triads") and modern racketeers in open competition for market share.²⁴ The Triads have been based in Hong Kong since the nineteenth century, with a network

²¹ See discussion *infra* Part V.B.

²² This Comment focuses on U.S. criminal proceedings and the constitutional issues that arise therein due to the U.S.-P.R.C. MLAA. It may be that it is problematic to provide evidence to Chinese prosecutors when Chinese defendants enjoy no such analogous rights under the Chinese Constitution or Chinese Criminal Procedure Law. See, e.g., JONATHON HECHT, LAWYERS COMMITTEE FOR HUMAN RIGHTS, OPENING TO REFORM? AN ANALYSIS OF CHINA'S REVISED CRIMINAL PROCEDURE LAW, 60-64 (1996) (arguing that Chinese trial standards do not meet international norms for fairness, including no presumption of innocence, purported use of illegally gathered evidence, and no fixed burden of proof); William C. Jones, *The Constitution of the People's Republic Of China*, 63 WASH. U. L.Q. 707 (1985) (positing that the Chinese Constitution does not provide cognizable rights in the American sense, but is rather a document for canvassing broad formulations of policy). The "rights" issue in Chinese law is subject to vastly differing and contentious views. See generally RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW, 533-46 (2002).

²³ See KERRY, *supra* note 14, at 51-53. In 1978, Deng Xiaopeng initiated the program of economic modernization. See STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO, 122-23 (1999).

²⁴ See KERRY, *supra* note 14, at 52-53.

among Chinese in the United States and other countries.²⁵ Modern racketeers like the "Big Circle" are often erstwhile members of the People's Liberation Army and the Red Guards, and focus on the illicit arms trade, among other things.²⁶ These groups are engaged in a wide range of criminal activities that generate enormous revenues.²⁷ U.S. law enforcement and criminologists identify the "Triads" as among the so-called "Big Five" of ethnically based, transnational organized crime.²⁸

According to experts, Triad societies in Hong Kong are purportedly the best organized societies in the Chinese diaspora,²⁹ with Hong Kong serving as the "capital" of their transnational criminal activities.³⁰ Hong Kong smuggling enterprises coordinate import-export networks between Southeast Asia, the P.R.C. and the United States.³¹ Since the 1980s, mainland Chinese organized criminal groups have increasingly flourished in the provinces of Guangdong, Fujian, Zhejiang and Yunnan, aided by

²⁵ See generally KO-LIN CHIN, CHINATOWN GANGS: EXTORTION, ENTERPRISE, AND ETHNICITY 5-11 (1996); LYNN PAN, SONS OF THE YELLOW EMPEROR: THE HISTORY OF THE CHINESE DIASPORA, 338-56 (2d ed. 1994). Triad societies have origins on the Chinese mainland that date back 2000 years. See generally MARTIN BOOTH, THE DRAGON SYNDICATES: THE GLOBAL PHENOMENON OF THE TRIADS 4-8 (1999).

²⁶ BOOTH, *supra* note 25, at 280-81. Big Circle can be further distinguished from traditional Triads by the fact that they dispense with historical ritual and expand criminal activities beyond the confines of overseas Chinese communities. *Id.* at 314.

²⁷ Growth industries for Chinese criminal groups are alien smuggling (estimated more than \$3.2 billion per year); trafficking in arms, stolen cars, boats and electronics (more than \$7 billion); and drug production and trade (\$200 billion) in 1996. KERRY, *supra* note 14, at 53. The volume of heroin and opium seizure has risen, respectively, from 2.376 and 1.1 metric tons in 1995 to 6.281 and 2.248 metric tons in 2000. Methamphetamines have skyrocketed from 1.608 metric tons in 1998 to 20.9 metric tons in 2000. *DEA Drug Intelligence Brief: China Country Brief as of March 2002*, at <http://www.usdoj.gov/dea/pubs/intel/02009/02009.htm> (last visited Nov. 15, 2002). Other activities of the Triads include illegal gambling, extortion, prostitution, loan-sharking, infiltrating legitimate businesses, and real estate. They number as many as 160,000 members, belonging to fifty groups. See *Problems and Dangers Posed by Organized Transnational Crime in the Various Regions of the World*, in *THE UNITED NATIONS AND TRANSNATIONAL ORGANIZED CRIME* 1, 16 (Phil Williams & Ernesto U. Savona eds. 1996) [hereinafter *Problems and Dangers*].

²⁸ See KERRY, *supra* note 14, at 21. The so-called "Big Five" international criminal organizations also include the Russian Mafiya, Japanese Yakuza, Italian Mafia, and Colombian cartels. See CarrieLyn Donigan Guymon, *International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention*, 18 BERKELEY J. INT'L L. 53, 57 (1987). This ethnic categorization is somewhat questionable given the emergent cooperative model of criminal enterprise. See generally Joseph L. Albin, *Donald Cressey's Contribution to the Study of Organized Crime: An Evaluation*, in UNDERSTANDING ORGANIZED CRIME IN GLOBAL PERSPECTIVE 16: A READER (Patrick J. Ryan & George E. Rush eds., 1997). See also Ko-lin Chin, et. al., *Transnational Chinese Organized Crime Activities: Patterns and Emerging Trends*, in COMBATING TRANSNATIONAL CRIME: CONCEPTS, ACTIVITIES, AND RESPONSES 127, 131 (Phil Williams & Dmitri Vlassis eds., 2001) (stating that Chinese heroin distribution in New York is closely associated with Dominican criminal groups).

²⁹ Chin et. al., *supra* note 28, at 128.

³⁰ See PAN, *supra* note 25, at 338-40.

³¹ See John Dombrink & John Huey-Long Song, *Hong Kong After 1997: Transnational Organized Crime in a Shrinking World*, in UNDERSTANDING ORGANIZED CRIME IN GLOBAL PERSPECTIVE: A READER 214, 217 (Patrick J. Ryan & George E. Rush eds., 1997).

financial support, practical experience and wider distribution links of Triad groups from Hong Kong (and Taiwan and Macau).³² Apart from smuggling, commentators suggest that major Triads, such as the Sun Yee On, have relocated operations to the South Chinese mainland.³³ As the Triads revive criminal activity on the mainland, Hong Kong and other coastal cities serve as trans-shipment points for Yunnan heroin, Chinese narcotic precursor chemicals, and Fujian aliens bound for the United States and elsewhere.³⁴

The effects of transnational organized crime threaten the foundations of national governments.³⁵ The rapid technological advances and scientific innovations "that underlie the process of economic globalization" have spurred a parallel global expansion and diversification of organized crime.³⁶ In some cases, organized crime represents a rival authority structure based on a black market economy of substantial proportions.³⁷ This "new authoritarianism" spreads as organized crime usurps the state's responsibilities, for example, in performing government social services.³⁸ This illegitimate power base could undermine democratic institutions and individual rights as corruption and intimidation sap integrity from a nation's judiciary, law enforcement, and the media.³⁹

The security threat to more authoritarian governments, like the P.R.C., is no less acute. Triads have reestablished secret criminal societies on the Chinese mainland by controlling prostitution, extortion rackets, and trafficking in drugs, women, and aliens.⁴⁰ An estimated 300 million disaffected, socially mobile people lack fixed labor and form an ideal

³² Chin et. al., *supra* note 28, at 129-30.; McElroy, *supra* note 14, at 14.

³³ See Fraser, *supra* note 14, at 3 ("Triad resurgence can be explained 'because they have the capital, they have experience running entertainment businesses, drugs, and women, [and] can be of use to local mainland criminal entrepreneurs.'" (quoting criminologist Professor Chu Yiu-kong of University of Hong Kong, Department of Sociology)).

³⁴ See Dombrink & Song, *supra* note 31, at 217; KERRY, *supra* note 14, at 51-52. Experts estimate that 50,000 Chinese are smuggled into the United States each year, and that the Chinese human trade yields an estimated annual profit of three billion U.S. dollars. Cleo J. Kung, *Supporting the Snakeheads: Human Smuggling From China and the 1996 Amendment to the U.S. Statutory Definition of "Refugee,"* 90 J. CRIM. L. & CRIMINOLOGY 1271, 1273 (2000).

³⁵ According to some analysts, "international organized crime is an assault on the three pillars of state sovereignty: the control of borders, the monopoly on the use of violence for enforcement, and the power to tax economic activity within state borders." Guymon, *supra* note 28, at 61.

³⁶ Edgardo Rotman, *The Globalization of Criminal Violence*, 10 CORNELL J. L. & PUB. POL. 1, 8 (2000).

³⁷ See *Problems and Dangers*, *supra* note 27, at 34.

³⁸ See Louise I. Shelley, *Transnational Organized Crime: The New Authoritarianism*, in THE ILLICIT GLOBAL ECONOMY AND STATE POWER 25, 32 (H. Richard Friman & Peter Andreas eds., 1999).

³⁹ See Rotman, *supra* note 36, at 10.

⁴⁰ See McElroy *supra* note 14, at 14. (citing Chinese MPS arrest figures: of the 247,000 arrested during a six-month clampdown on prostitution, more than 5,000 detainees held senior positions in *hei shiwei* (or "black societies")).

criminal labor force.⁴¹ Internally, P.R.C. officials fear the proliferation of secret Triad societies that co-opt displaced rural migrants to dynamic urban centers like Beijing, Shenzhen, and Shanghai.⁴² Chinese authorities claim the number of Triads in the P.R.C. reaches upward of one million.⁴³

Triad activity on the mainland is part of a mounting crime wave that vexes P.R.C. officials.⁴⁴ With frenetic economic activity, the drive for profits has blurred the distinctions between business, crime, and government.⁴⁵ Triads exploit the economic liberalization and corrupt P.R.C. officials to entrench criminal enterprises.⁴⁶ The pervasiveness of corruption in government agencies of the P.R.C. also illustrates the degree to which Triad and other organized criminal activity undermines P.R.C. authority.⁴⁷ For instance, the Public Security Bureau ("PSB"), the government entity charged with fighting crime, is allegedly rife with graft and corruption.⁴⁸ The effect is to undermine Chinese sovereignty internally and circumvent control of P.R.C. borders through illicit trade.⁴⁹ As the McCaffrey Announcement suggests, U.S. authorities view the expanding narcotics trade in East Asia as a ready basis for joint law enforcement activities and judicial cooperation pursuant to the U.S.-P.R.C. MLAA.⁵⁰ Aside from the topical threat, if organized crime succeeds in unraveling state authority, deeper concerns about P.R.C. stability and its international repercussions further prompt U.S. strategies for mutual legal assistance with the P.R.C.⁵¹

⁴¹ BOOTH, *supra* note 25, at 324.

⁴² See McElroy, *supra* note 14, at 14.

⁴³ *Jobless Migrants Swell China's Triads*, STRAITS TIMES (SINGAPORE), Oct. 27, 2000, at 20 [hereinafter *Jobless Migrants*]. See also BOOTH, *supra* note 25, at 326. ("Chinese criminologists estimate that the number of organized-crime gang members in China escalated from 100,000 in 1986 to over 500,000 in 1994: the figure is now likely to be in the region of 1.5 million.")

⁴⁴ See McElroy, *supra* note 14.

⁴⁵ KERRY, *supra* note 14, at 51-52.

⁴⁶ See *Jobless Migrants*, *supra* note 43.

⁴⁷ See, e.g., DAVID M. LAMPTON, SAME BED, DIFFERENT DREAMS: MANAGING U.S.-CHINA RELATIONS 1989-2000 145 (2001); KERRY *supra* note 14, at 51 (noting threat of pervasive corruption in the P.R.C.).

⁴⁸ James J. McKenna, *Organized Crime in the Former Royal Colony of Hong Kong*, in UNDERSTANDING ORGANIZED CRIME IN GLOBAL PERSPECTIVE: A READER 205, 213 (Patrick J. Ryan & George E. Rush eds., 1997).

⁴⁹ LAMPTON, *supra* note 47, at 145 (pointing to President Jiang Zemin's decision to form of an anti-smuggling police force to stymie endemic corruption among P.R.C. customs and immigration officials).

⁵⁰ McCaffrey Announcement, *supra* note 1.

⁵¹ See KERRY, *supra* note 14, at 69.

III. BILATERAL MUTUAL LEGAL ASSISTANCE TREATIES AS TOOLS IN COMBATING TRANSNATIONAL ORGANIZED CRIME

In the last thirty years, MLATs have emerged as mechanisms to streamline international judicial assistance to combat transnational organized crime.⁵² With greater frequency, U.S. authorities apply these agreements as prosecutorial tools to enhance the inter-jurisdictional exchange of physical evidence and facilitation of witness testimony among signatories.⁵³ The direct exchange between prosecutors is far superior to the antiquated letters rogatory approach that involved discretionary orders by foreign courts pursuant to each request for production of evidence.⁵⁴ Each successive MLAT is adapted to overcome particular obstacles of sovereignty among signatory countries.⁵⁵ The overall effect, moreover, is that international law enforcement increasingly reflects U.S. policy interests to such a degree that some commentators have described this evolution as an "Americanization" of international law enforcement,⁵⁶ even if U.S. constitutional protections have not necessarily followed in tow.⁵⁷

A. *Letters Rogatory: The Inefficient Predecessor to Mutual Legal Assistance Treaties*

Prior to the advent of MLATs, U.S. prosecutors resorted to letters rogatory as the principal method for obtaining evidence abroad.⁵⁸ Under the basic principles of international law, a sovereign state is not obligated to produce persons, physical evidence, or documents as evidence for proceedings in another national jurisdiction.⁵⁹ This time-consuming,

⁵² NADELMANN, *supra* note 12, at 315. While civil law countries had concluded treaties with respect to judicial assistance in criminal matters as early as the 1820's, "the United States did not become interested in such treaties until the late 1940's and early 1960's." See Bruce Zagaris & Jessica Resnick, *The Mexico-US Mutual Legal Assistance in Criminal Matters Treaty: Another Step Toward The Harmonization of International Law Enforcement*, 14 ARIZ. J. INT'L & COMP. L. 5, 5 (1997).

⁵³ The United States currently has operative MLATs with over fifty countries. See ABBELL, *supra* note 15, app. C, at A-45.

⁵⁴ Abramovsky, *supra* note 13, at 206-07.

⁵⁵ See Mark K. Gyandoh, Notes and Comments, *Foreign Evidence Gathering: What Obstacles Stand In the Way of Justice?*, 15 TEMP. INT'L. & COMP. L. J. 81, 90 (2001).

⁵⁶ NADELMANN, *supra* note 12, at 470, 475-76 (noting fusion of law enforcement and national security concerns).

⁵⁷ See discussion *infra* Part V.

⁵⁸ NADELMANN, *supra* note 12, at 318-19.

⁵⁹ Among the principles inherent in national sovereignty are exclusivity and non-intervention. The courts of a sovereign state have exclusive jurisdiction over matters within the borders of that state and they have a duty not to intervene in the affairs of other sovereign states. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 289 (5th ed. 1998). While organized crime has accompanied economic

circuitous process requires that formal requests be submitted through diplomatic channels to foreign courts, which issue orders to the foreign "Appropriate Authority" to produce the requested evidence.⁶⁰ The foreign authority in turn transmits the requested evidence back through the same channels.⁶¹ This process is generally unreliable due to the vast differences in processing procedures and the wide variation on the limits set by national law defining what may be requested through this process.⁶²

Despite some limited ad hoc procedural innovations,⁶³ coordinated bilateral prosecutions outside the MLAT context remain hampered by the necessity of letters rogatory.⁶⁴ Nonetheless, this antiquated system remains the primary method for criminal defendants seeking exculpatory evidence abroad.⁶⁵

B. *Definition and Legal Framework of Mutual Legal Assistance Treaties*

An MLAT is a bilateral agreement between two countries in which the parties agree to provide assistance in certain prosecutorial procedures.⁶⁶ Typical MLAT provisions include execution of requests regarding search warrants; taking testimony or statements; document production; service of writs, summonses, or other judicial orders; locating persons; and providing judicial records, evidence, and information.⁶⁷ These agreements are binding and also provide for assistance in related civil or administrative proceedings.⁶⁸ Under an MLAT, the parties establish a central authority in each state to oversee compliance with its terms.⁶⁹ In the United States, the

globalization in innovation, diversification and transnational reach, law enforcement has been traditionally limited by the confines of sovereignty and national jurisdiction. NADELMANN, *supra* note 12, at 5-7.

⁶⁰ See ABBELL, *supra* note 15 §3-3, at 6. The transmittal of letters rogatory to and from the United States is regulated by 28 U.S.C. §1781. See ABBELL, *supra* note 15, § 2-2, at 1.

⁶¹ *Id.* §3-3, at 6.

⁶² See Peter J. Vassalo, Note, *The New Ivan the Terrible: Problems in International Criminal Enforcement and the Specter of the Russian Mafia*, 28 CASE W. RES. J. INT'L L. 173, 189 (1996).

⁶³ The 1970 Amendments to Rule 15 of Federal Rules of Criminal Procedure (1946) (permitting federal prosecutors, as a hearsay exception in organized crime cases, to take depositions from witnesses abroad who were unable or unwilling to appear in U.S. court); The 1975 Amendments of Rule 15 of Federal Rules of Criminal Procedure (1946) (extending the hearsay exception to all federal criminal cases). See NADELMANN, *supra* note 11, at 324.

⁶⁴ See ABBELL, *supra* note 15, §3-9, at 12.

⁶⁵ See discussion *infra* Part V.A.

⁶⁶ See Abramovsky, *supra* note 13, at 207 (stating that MLATs are the most comprehensive of all international evidence-gathering processes).

⁶⁷ See Barry Kellman & David S. Gualtieri, *Barricading the Nuclear Window: A Legal Regime to Curtail Nuclear Smuggling*, 1996 U. ILL. L. REV. 667, 727 (1996).

⁶⁸ See James I.K. Knapp, *Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy*, 20 CASE W. RES. J. INT'L L. 405, 406 (1988).

⁶⁹ NADELMANN, *supra* note 12, at 342 (discussing the U.S.-Switzerland MLAT).

Office of International Affairs ("OIA") functions as the Central Authority within the U.S. DOJ to coordinate international law enforcement concerns and to process MLAT requests.⁷⁰

The general purpose of an MLAT is to overcome entrenched jurisdictional obstacles and foreign procedures that render evidence, such as depositions and authenticated documents, inadmissible in U.S. courts.⁷¹ MLATs first identify specific areas in which there is a need for bilateral cooperation, and then create legal frameworks to facilitate the exchange of relevant evidence and information.⁷² In contrast to letters rogatory, a mutual assistance treaty in criminal matters obligates each party to render assistance pursuant to the terms of the treaty.⁷³ The state from which mutual legal assistance is requested usually does not conduct procedures such as deposing witnesses—it only supports the foreign criminal procedure conducted by the requesting state.⁷⁴ As a result, MLATs lead signatories to surrender a certain degree of sovereignty and to allow some foreign intrusion into traditionally domestic areas of crime control.⁷⁵

It is important to note, however, that "political offense"⁷⁶ and "human rights"⁷⁷ exception clauses are often drafted into MLATs as specific grounds for denying assistance, especially with non-democratic governments.⁷⁸ These exception clauses permit the requested country to deny assistance when it is wary that the requesting country seeks to misuse its judicial system to punish or harass political opponents.⁷⁹ The generic formulation of "political offense" non-applicability grounds derives from the U.S.-

⁷⁰ See S. EXEC. REP. NO. 105-22, at 4 (1998) (providing technical analysis of MLAT with Brazil, Czech Republic, Hong Kong, and other bilateral partners).

⁷¹ See NADELMANN, *supra* note 12, at 327 (stating U.S. treaty negotiators' objectives with Switzerland in 1977 served as a model for future MLATs).

⁷² See Vassalo, *supra* note 62, at 188-89 (noting that a request is processed more quickly because the requesting state must only contact the representative of the requested state specified in the treaty, which eliminates the role of the courts).

⁷³ See ABBELL, *supra* note 15, §4-3, at 4.

⁷⁴ See Eugene Solomonov, Comment, *U.S.-Russian Mutual Legal Assistance Treaty: Is There a Way to Control Russian Organized Crime?*, 23 FORDHAM INT'L L.J. 165, 200 (1999).

⁷⁵ See Vassalo, *supra* note 62, at 188 (stating that provisions in the MLAT between United States and Switzerland take precedence over all national laws).

⁷⁶ See, e.g., U.S.-France MLAT, art. VI(1)(a), reprinted in ABBELL, *supra* note 15, app. D., at A-139; U.S.-Jamaica MLAT, art. II(1)(b), reprinted in ABBELL, *supra* note 15, app. D, at A-190.

⁷⁷ See, e.g., Bilateral Agreement Between the Government of the United States and the Commonwealth of the Bahamas on the Control of Narcotic Drugs and Psychotropic Substances (entered into force Feb. 17, 1989), art. I(3), reprinted in ABBELL, *supra* note 15, app. D., at A-87 [hereinafter U.S.-Bahamas MLAT].

⁷⁸ See ABBELL, *supra* note 15, §4-5, at 39; NADELMANN, *supra* note 12, at 351-52.

⁷⁹ NADELMANN, *supra* note 12, at 351.

Switzerland MLAT.⁸⁰ Every MLAT reserves discretion to deny requests if assistance would prejudice a signatory's sovereignty, security or other public interest.⁸¹

C. *The Evolving Harmonization of International Law Enforcement Through the Mutual Legal Assistance Treaty*

The United States currently has MLATs with many countries where significant criminal organizations operate.⁸² Each MLAT serves two main purposes. First, through mutual assistance, the signatories bolster certain types of criminal prosecutions.⁸³ Second, an MLAT reconciles two disparate sovereign systems in a consistent framework that transcends the immediate stated objective of the agreement (such as immobilizing narcotics trafficking).⁸⁴ Each MLAT thus evinces U.S. motivations particular to foreign policy considerations concerning the treaty partner.⁸⁵ The cumulative result of this treaty-making is the internationalization of U.S. law enforcement with diminishing legal impediments to its reach.⁸⁶ According to Professor Ethan Nadelmann of Princeton University, a noted scholar of the internationalization of U.S. law enforcement, "MLATs, with their emphasis on reconciling the needs, procedures, and customs of different legal systems, epitomize the notion of *accommodation*."⁸⁷ While the fifty or more agreements on mutual legal assistance offer myriad examples of this

⁸⁰ See Agreement Between the United States and Switzerland Relating to the Treaty of May 25, 1973, on Mutual Assistance in Criminal Matters (entered into force Jan. 23, 1977), art. II(1)(c)(1), reprinted in ABBELL, *supra* note 15, app. D, at A-264 [hereinafter U.S.-Switzerland MLAT] (stating the grounds for non-applicability of treaty obligations "concerning an offense which the requested state considers a political offense or an offense connected with a political offense").

⁸¹ ABBELL, *supra* note 15, §4-5, at 37.

⁸² These countries include: The Bahamas, Canada, Colombia, Hong Kong, Italy, Mexico, the Netherlands, Switzerland, the United Kingdom (including the Cayman Islands), Russia, among others. For a complete list as of Jan. 2002, see *id.* app. C, at A-45-46.

⁸³ NADELMANN, *supra* note 12, at 345 (citing emphasis in U.S. MLATs with Colombia and The Netherlands on immobilization of drug trafficking in the Caribbean).

⁸⁴ For example, in the MLAT with Italy, the United States expanded its subpoena power and innovated a type of cooperation to include the sharing of forfeiture assets. See Treaty with Italian Republic on Mutual Assistance in Criminal Matters, with Memorandum of Understanding, Nov. 9, 1982 (entered into force Nov. 13, 1985), art. I, reprinted in ABBELL, *supra* note 15, app. D, at A-177 [hereinafter MLAT U.S.-Italy]. See NADELMANN, *supra* note 12, at 353-54.

⁸⁵ See Gyandoh, *supra* note 55, at 90.

⁸⁶ Indeed, this is Nadelmann's larger thesis: U.S. law enforcement seeks to operate internationally free of the confines of national sovereignty. NADELMANN, *supra* note 12, at 477. The MLAT functions to extend this U.S. reach piecemeal, organically stitching together jurisdictions in enforceable bilateral treaties. Cf. Guymon, *supra* note 28, at 83, 99 (arguing that MLATs' effectiveness is limited without concurrent international convention against transnational organized crime).

⁸⁷ *Id.* at 316-17.

gradual accommodation, a few landmark treaties stand out for their illustrative utility.

The MLAT's circumvention of bank secrecy laws is a prime example of this accommodation.⁸⁸ The U.S.-Switzerland MLAT removed legal obstacles to permit disclosure of banking records of Sicilian organized crime figures who attempted to take advantage of stringent Swiss financial privacy laws to shelter ill-gotten gambling proceeds.⁸⁹ The treaty reconciled the demands of both nations by limiting the scope of assistance to offenses involving gambling or organized crime.⁹⁰ Similar MLAT provisions with the Cayman Islands, Bahamas, and Canada focused on the objectives of U.S. Attorneys to access illicit drug proceeds sheltered in British Caribbean tax havens under stiff bank secrecy laws.⁹¹ The scope of the U.S.-Cayman treaty was eventually expanded to include requests in drug-related cases and offenses such as insider trading.⁹² In addition, these treaties functioned to rein in U.S. attorneys who increasingly resorted to unilateral measures to obtain financial information about narcotics traffickers.⁹³ Accommodation in these instances served both to expand the reach of U.S. prosecutors and to limit the manner of extraterritorial assertion of jurisdiction.

The accretion of MLATs in the last thirty years has created a growing web of bilateral agreements that link sovereign jurisdictions, gaps that were previously bridged with difficulty under the ineffective letters rogatory system.⁹⁴ The United States in particular has allocated enormous resources to support aggressive international policing.⁹⁵ Nadelmann argues that "harmonization" is an evolution of international legal mechanisms that incorporates three processes: *regularization* of relations among law

⁸⁸ See generally Elliot A. Stultz, *Swiss Bank Secrecy and the United States Efforts to Obtain Information from Swiss Banks*, 21 VAND. J. TRANSNAT'L L. 81-104 (1988).

⁸⁹ See Zagaris & Resnick, *supra* note 52, at 5. In Switzerland, tax evasion and customs violations are far less serious. Lionel Frei & Stefan Treschel, *Origins and Applications of the United States-Switzerland Treaty on Mutual Legal Assistance in Criminal Matters*, 31 HARVARD INT'L L.J. 77, 79 (1990).

⁹⁰ *Id.* at 83.

⁹¹ NADELMANN, *supra* note 12, at 357, 368-69.

⁹² *Id.* at 363.

⁹³ *Id.* at 360-61. As local courts were often reluctant to issue orders of disclosure in response to U.S. letters rogatory, U.S. prosecutors asserted jurisdiction in the form of subpoenas *duces tecum* on banks with subsidiaries in the United States to produce documents from off-shore banks. *Id.* at 361. These unilateral measures, eventually known as *Bank of Nova Scotia* subpoenas, rankled British, Canadian, Bahamian, and Caymanian authorities because compliance risked violation of the Caymanian Confidential Relationships (Preservation) Law. See Gyandoh, *supra* note 55, at 95-97. See also *United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983) (upholding the legality of subpoenas and a fine for failure to comply served on a Miami branch of a Canadian bank to produce documents from a Bahamian branch).

⁹⁴ NADELMANN, *supra* note 12, at 394-96.

⁹⁵ *Id.* at 472-73, 475-76 (noting an increasing convergence between U.S. international enforcement and foreign policy interests).

enforcement officials in day-to-day practice, *accommodation* of central structural differences between sovereign systems through MLATs, and *homogenization* of statutory schemes toward a common norm.⁹⁶ He further contends this process is increasingly synonymous with "Americanization" of international law enforcement,⁹⁷ as cooperation generally reflects American interests in substance and procedure.⁹⁸ For instance, joint prosecutions disproportionately target narcotics-related offenses in the U.S. "war on drugs," while MLATs ensure that evidence meets strict U.S. admissibility standards.⁹⁹ In spite of this so-called "Americanization," critics of MLATs point to deficiencies in this framework that diminish criminal defendants' constitutional rights,¹⁰⁰ which are inherent in the U.S. legal system.

IV. THE SUBSTANCE AND SCOPE OF U.S.-P.R.C. AGREEMENT ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

The McCaffrey Announcement emphasized drug trafficking and associated criminality as the focal point of the mutual legal assistance envisioned by U.S. authorities.¹⁰¹ The United States and the P.R.C. designated the Attorney General and the Ministry of Justice ("MOJ") as the respective central authorities charged with processing requests for assistance.¹⁰² The scope of application of the U.S.-P.R.C. MLAA includes: serving documents; taking the testimony or statements of persons; providing originals, certified copies, records or articles of evidence; obtaining and

⁹⁶ *Id.*

⁹⁷ *Id.* at 470.

⁹⁸ *Id.* at 471. See discussion *infra* Part V.C.

⁹⁹ *Id.* at 314, 317.

¹⁰⁰ See, e.g., Zachary Margulis-Ohnuma, Note, *The Unavoidable Correlative: Extraterritorial Power and the United States Constitution*, 32 N.Y.U. J. INT'L L. & POL. 147 (1999) (advocating the extension of Fourth Amendment protections to people outside U.S. territory who are victims of illegal searches and seizures by U.S. law enforcement acting independently or in concert with host country); Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. REV. 1201 (1998) (advocating the extension of the privilege against self-discrimination in the international context to grant foreign witnesses immunity under the Fifth Amendment where fear of foreign prosecution is asserted due to statements made in U.S. courts); Micheal Abbell, *DOJ Renews Assault on Defendants' Right to Use Treaties to Obtain Evidence from Abroad*, THE CHAMPION, Aug. 1997, at 20, 21 (arguing that MLATs should expressly permit defendants access to evidence abroad to avoid compromising their Sixth Amendment rights). See also discussion *infra* Part V.C.

¹⁰¹ See McCaffrey Announcement, *supra* note 1. As of December 1, 2002, requests for evidence have been limited to witness statements and banking records. E-mail correspondence from Harry Marshall, negotiator of U.S.-P.R.C. MLAA, U.S. Department of Justice, Office of International Affairs, to David Whedbee, Comment Author, *Pacific Rim Law and Policy Journal* (Dec. 1, 2002) (on file with the author) [hereinafter Marshall Correspondence].

¹⁰² U.S.-P.R.C. MLAA, *supra* note 1, art. II. The Chinese Central Authority is the Ministry of Justice. See McCaffrey Announcement *supra* note 1.

providing expert evaluations; making persons available to give evidence or assist in investigations; locating or identifying persons; executing requests for inquiry, and searches; freezing and seizure of evidence; assisting in forfeiture proceeding; transferring persons in custody for giving testimony or assisting in investigations; and any other form of assistance not contrary to the laws of the requested party.¹⁰³ The Agreement's obligations expressly exclude "a right on the part of any private person to obtain, suppress, or exclude any evidence."¹⁰⁴ This provision bars criminal defendants access to the streamlined evidence-gathering capacity afforded the prosecution.¹⁰⁵

Article 3 of the U.S.-P.R.C. MLAA sets forth the limitations on assistance.¹⁰⁶ In subsection 1(a), the parties did not adopt the dual criminality requirement that the offense for which assistance was requested must correspond to the same or similar offense under the criminal laws of the requested party.¹⁰⁷ This discretionary approach allows for more flexibility in coordinating prosecution of criminal activity that might not be codified in the P.R.C.¹⁰⁸ Subsection 1(b) provides for exceptions for a "purely military offense."¹⁰⁹ In subsection 1(c), the broad discretionary exception category designates that requests may be denied that "would prejudice the sovereignty, security, public order (*ordre publique*), important public policy or other essential interests of the Request Party."¹¹⁰ Article 3 also provides that the requested party may deny assistance if "the execution of the request would be contrary to the Constitution of the Requested Party,"¹¹¹ or if the "assistance requested lacks substantial connection with the case."¹¹²

As a further limitation on assistance, an expansive political offense exception is included under Article 3(1)(c).¹¹³ In contrast to a generic

¹⁰³ See U.S.-P.R.C. MLAA, *supra* note 1, art. I(1); (2)(a-j).

¹⁰⁴ *Id.* art. I(3).

¹⁰⁵ See discussion *infra* Part V.A.

¹⁰⁶ See generally U.S.-P.R.C. MLAA, *supra* note 1, art. III.

¹⁰⁷ *Id.* art. III(1)(a). Dual criminality requires that the evidence exchanged under an MLAT pertain to an offense which contains similar elements in each signatory country. See Frei & Treschel, *supra* note 89, at 84-85. (discussing dual criminality requirement in the U.S.-Switzerland MLAT).

¹⁰⁸ U.S.-P.R.C. MLAA, *supra* note 1, art. III(1)(a) (stating that parties "may agree to provide assistance for a particular offense, or category of offenses, irrespective of whether the conduct would constitute an offense under the laws in the territory of both Parties").

¹⁰⁹ *Id.* art. III(1)(b).

¹¹⁰ *Id.* art. III(1)(c).

¹¹¹ *Id.* art. III(e).

¹¹² *Id.* art. III(g).

¹¹³ *Id.* art. III(1)(c). See also Marshall Correspondence, *supra* note 101 (noting expansion of exception in U.S.-P.R.C. MLAA).

exception clause,¹¹⁴ the scope of this exception in the U.S.-P.R.C. MLAA is greater in specificity:¹¹⁵

[T]he Requested Party may deny assistance if . . . the request relates to a political offense or the request is politically motivated or there is substantial grounds for believing that the request was made for the purpose of investigating, prosecuting, punishing, or otherwise proceeding against a person on account of his race, religion, nationality or political opinions.¹¹⁶

The expanded political offense exception marks a significant response to the Chinese criminal justice system, widely decried for its record of human rights abuses and prosecution of political crimes.¹¹⁷

The adoption of the P.R.C. 1997 Criminal Law ("CL") formally aimed to depoliticize Chinese criminal law,¹¹⁸ which was the target of much human rights criticism.¹¹⁹ However, commentators regard this reform as largely a superficial shift in rhetoric rather than an elimination of politically motivated prosecutions.¹²⁰ Pursuant to Article 3(1)(d) of the U.S.-P.R.C.

¹¹⁴ The generic "political offense" clause has been regularly included as an exception in the framework for judicial assistance, especially with non-democratic governments. See NADELMANN, *supra* note 12, at 351-52. This generic formulation of "political offense" non-applicability grounds derives from the U.S.-Switzerland MLAT. See U.S.-Switzerland MLAT, *supra* note 80, art. II(1)(c)(1) reprinted in ABBELL, *supra* note 15, app. D, at A-264 (stating the grounds for non-applicability of treaty obligations "concerning an offense which the requested state considers a political offense or an offense connected with a political offense").

¹¹⁵ Mr. Marshall did not elaborate on U.S. negotiators' motivations, except to note that the political offense clause contained more detailed language than standard clauses. See Marshall Correspondence, *supra* note 101. It should be noted that this expanded clause is consistent with the U.S.-Hong Kong MLAT. Cf. Agreement with Hong Kong on Mutual Legal Assistance in Criminal Matters, With Annex, Apr. 15, 1997, U.S.-Hong Kong, art. III(1)(c) S. TREATY DOC. NO. 105-6 (1997) [hereinafter U.S.-Hong Kong MLAT].

¹¹⁶ U.S.-P.R.C. MLAA, *supra* note 1, art. III(1)(d).

¹¹⁷ See, e.g., DONALD C. CLARKE, LAWYERS COMMITTEE FOR HUMAN RIGHTS, WRONGS AND RIGHTS: A HUMAN RIGHTS ANALYSIS OF CHINA'S REVISED CRIMINAL LAW, 67 (1998); Ian Dobinson, *The Criminal Code of the People's Republic of China (1997): Real Change or Rhetoric?*, PAC. RIM L. & POL. J. 1, 44-51 (2001).

¹¹⁸ See Criminal Law of the People's Republic Of China (amended 2nd Sess. of the 8th National People's Congress on March 14, 1997), art. 1, translated in WEI LUO, AMENDED CRIMINAL LAW OF THE PEOPLE'S REPUBLIC OF CHINA: WITH TRANSLATION, INTRODUCTION, AND ANNOTATION 33 (1998) and the 1997 version of the Criminal Law of the People's Republic Of China, art.1 (removing Marxist-Leninist language as the basis for the 1997 Criminal Law, and stating that the law "is formulated . . . in the struggle against crime, in order to punish crime and protect people"). See *id.* at 13-16 [hereinafter CL].

¹¹⁹ See CLARKE, *supra* note 117, at 42-46.

¹²⁰ See Dobinson, *supra* note 117, at 59-62; CLARKE, *supra* note 117 at 44-46. Under Article 2 of the 1979 Criminal Law, the objective of Chinese criminal law was to "fight against all counterrevolutionary acts in order to defend the system of the dictatorship of the proletariat." Dobinson, *supra* note 117, at 24 (citing Article 2 of the Criminal Law of the People's Republic of China (1979)). Nevertheless, the

MLAA, U.S. Central Authority can pierce the superficial changes in the language of the Chinese CL and identify underlying substantive political offenses as the objective of Chinese prosecutions. In practical terms, Article 3(d) allows U.S. authorities to withhold evidence that might assist in the prosecution of political dissidents or ethnic minorities. The language of Article 3(d) is symbolically significant, too, as it adopts language directly from the United Nations Convention Relating to the Status of Refugees, which serves as the basis for political asylum in many countries, including the United States.¹²¹

The flexibility of the United States to limit assistance on these grounds is necessary because the Chinese procuratorate can prosecute "cult groups" like the Falun Gong as readily as any Triad group under the CL. For instance, Article 300(1) of the CL outlaws secret societies which are organized or used for gain.¹²² Interestingly, when the CL was adopted in 1997, the Falun Gong had not attained national notoriety as a "cult group."¹²³ The language of the Article 300, subsections (2) and (3) of the CL, prohibits deception through superstitious or secret societies to "cheat," "have sexual relations with a woman" or "swindle property," yet these criminal provisions could just as well be aimed at Triad rackets in large mainland cities.¹²⁴ In light of the loosening ideological cogency of the Chinese Communist Party,¹²⁵ it is not surprising that P.R.C. authorities would be equally concerned about the powerful draw of Falun Gong or Triad brotherhoods.¹²⁶ Inasmuch as the Supreme People's Court ("SPC") criminalized "[c]ollaborating with overseas groups, organizations, and individuals for sect-related activities,"¹²⁷ the U.S. OIA may withhold

substance of these reclassified offenses remains virtually the same. *Id.* at 26 (citing Article 103 of the CL, which makes it a crime to "organize, plot, or act to split the country or undermine national unification").

¹²¹ United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S., art. I (A)(2). For similar language in U.S. asylum law, see 8 U.S.C. §§ 101(a)(42)(A), 209(b)(1) (2002) ("Immigration and Nationality Act").

¹²² "Anyone who organizes or utilizes a superstitious sect, secret society or cult, or takes advantage of some people's superstitions to undermine the implementation of national law shall be sentenced [from three to seven years]." CL, *supra* note 118, art. 300(1) at 161.

¹²³ In October 1999, the Chinese authorities applied Article 300 of the CL after large demonstrations had been staged by the Falun Gong in Beijing. See Dobinson, *supra* note 117, at 44-45 (citing as an interpretation of Article 300, the National People's Congress Standing Committee's Decision Regarding Outlawing Cult Organizations and Punishing Cult Activities [hereinafter Decision Regarding Cults]).

¹²⁴ See Fraser, *supra* note 14 (documenting rise of Triad "secret societies" in mainland cities). It is worth recalling that until the demise of the Q'ing dynasty in 1911, Triad societies fused a rich mythology, religious symbolism, and criminal activity into an alluring opposition to imperial rule. See BOOTH, *supra* note 25, at 13-14, 19-21.

¹²⁵ See, e.g., PEERENBOOM, *supra* note 22, at 172 (citing waning ideological persuasiveness of socialism); LUBMAN, *supra* note 23, at 171 (discussing the ideological vacuum in the P.R.C.).

¹²⁶ See Fraser, *supra* note 14.

¹²⁷ Dobinson, *supra* note 117, at 45 (quoting Decision Regarding Cults).

assistance for any prosecution of groups like the Falun Gong, while assisting prosecution efforts of Triad transnational criminal activity.

The U.S.-P.R.C. MLAA also contains provisions covering the manner in which evidence may be obtained in the requested country. Such provisions include the availability of witnesses to assist investigations and/or testify in the requesting country, and the transfer of witnesses to the requesting country.¹²⁸ Article 9 covers the obligations to take evidence in the requested country.¹²⁹ Article 9(1) requires that the requested country compel a witness "to appear or produce evidence, including documents, records, or articles."¹³⁰ Such a person subpoenaed may "pose questions and make a verbatim transcript" in a manner "not contrary to the laws in the territory of the Requested country."¹³¹ Written statements or depositions are to be transmitted in a form admissible in the requesting country.¹³² Most significant, if the witness called pursuant to the U.S.-P.R.C. MLAA asserts any claim of "immunity, incapacity, or privilege under the laws of the [requesting country], the [taking of evidence] shall not be impeded,"¹³³ and the claim "shall be made known to the Central Authority of the Requesting Party for resolution by the authorities of that Party."¹³⁴ This clause suggests that the courts of the requesting country might be required to adjudicate a claim of immunity or a privilege against self-incrimination in regard to certain testimony while the remainder of the testimony would proceed unimpeded.

Article 14 provides for execution of requests, "insofar as national law permits . . . for inquiry, search, freezing, and seizure of evidentiary materials."¹³⁵ If necessary, terms and conditions may be imposed to protect the interests of third parties.¹³⁶ Finally, Article 16 allows for discretionary assistance in forfeiture proceedings whereby the parties may inform their

¹²⁸ See e.g., U.S.-P.R.C. MLAA, *supra* note 1, art. IX ("Taking Evidence in the Requested Party"); art. XI ("Availability of Persons to Give Evidence or Assist in Investigation in the Territory of the Requesting Country"); art. XII ("Transfer of Persons in Custody for Giving Evidence or Assisting in Investigation").

¹²⁹ *Id.* art. IX.

¹³⁰ *Id.* art. IX(1) ("A person [in the requested country] shall be compelled, if necessary or in conformity [with the MLAA], to appear and testify or produce evidence, including documents, records, or articles"). It should be noted that the signatory countries do not adopt the so-called "international subpoena" compelling testimony in the requesting country. *Cf. id.* art. XII(2) (requiring consent of witness before transfer to the requesting country to testify).

¹³¹ *Id.* art. IX(3).

¹³² *Id.* art. IX(5).

¹³³ *Id.* art. IX(4).

¹³⁴ U.S.-P.R.C. MLAA, *supra* note 1, art. IX(4).

¹³⁵ *Id.* art. XIV(1).

¹³⁶ *Id.* art. XIV(4).

respective Central Authorities if either becomes aware of "proceeds or instrumentalities . . . that may be forfeitable" for determination whether an action is appropriate.¹³⁷

The U.S.-P.R.C. MLAA furnishes the procedural mechanisms to streamline the exchange of evidence and witnesses between the two sovereign nations. Expanded evidence-gathering capacity is appropriate and necessary to coordinate Sino-American prosecutions in combating crime that by definition extends beyond sovereign borders. The flexibility in limiting assistance, moreover, exerts effective instrumentalist pressure against continuing to prosecute such political offenses. By engaging the P.R.C. in the realm of judicial assistance, the MLAA can curb criminalization of "political offenses" in the P.R.C. by demonstrably withholding cooperation. Instead of decrying Chinese abuses from the outside, the MLAA procedural framework regularizes the content of criminality between the two nations to exclude political offenses. Under Nadelmann's rubric, the exception works as an inverse of accommodation.¹³⁸ Through the U.S.-P.R.C.-MLAA, the U.S. government can invoke this exception as a pragmatic barrier to cooperation rather than mere moral condemnations of human rights abuses.

V. IMBALANCE UNDER THE U.S.-P.R.C. MUTUAL LEGAL ASSISTANCE AGREEMENT

Under Nadelmann's rubric, the MLAT functions to accommodate two sovereign legal systems.¹³⁹ When comparing the criminal justice systems of the United States and P.R.C., the historical and practical disparity of underlying social values is vast and problematic.¹⁴⁰ Despite reforms adopted in the People's Republic of China 1996 Criminal Procedure Law ("CPL")¹⁴¹ and People's Republic of China 1997 Criminal Law,¹⁴² the Chinese government and Chinese Communist Party have only tentatively recognized

¹³⁷ *Id.* art. XVI.

¹³⁸ See discussion *supra* Part III.B.

¹³⁹ NADELMANN, *supra* note 12, at 316-17.

¹⁴⁰ The United States maintains an adversarial system that emphasizes limited government intrusion and protection of individual rights. See Gregory W. O'Reilly, *England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice*, 85 J. CRIM. L. & CRIMINOLOGY 402, 421 (1994). The P.R.C., on the other hand, historically adopted a strictly penal approach to criminal law, devoid of "rights" as understood in its dense Western political and jurisprudential meaning. See generally THOMAS B. STEPHENS, *ORDER AND DISCIPLINE IN CHINA* (1992).

¹⁴¹ Criminal Procedure Law of the People's Republic Of China (adopted 4th Sess. of the 8th National People's Congress on March 17, 1996, effective as of Jan. 1, 1997), translated in WEI LUO, AMENDED CRIMINAL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA: WITH TRANSLATION, INTRODUCTION, AND ANNOTATION, 27-124 (2000) [hereinafter CPL].

¹⁴² CL, *supra* note 118, at 23-226.

the rights of criminal suspects against the interests of the state.¹⁴³ In regard to evidence-gathering, Chinese procuratorates have unfettered access to evidence, while defendants have no independent subpoena power and are subject to discretionary obstacles in accessing evidence and witnesses, especially in cases involving broadly defined "state secrets."¹⁴⁴

The Sino-American relationship through the U.S.-P.R.C. MLAA replicates this disparity, raising serious constitutional questions for defendants in U.S. criminal proceedings. In particular, the U.S.-P.R.C. MLAA dramatizes the imbalance between the prosecutors' monopoly on the use of the streamlined mechanism ready access to evidence abroad, and the unreliable letters rogatory reserved for defendants.¹⁴⁵ The difference in evidence-gathering capacity means that U.S. prosecutors have quick and extensive access to evidence in the P.R.C. while defendants have no way of compelling the MPS to produce exculpatory evidence. As defendants attempt to gather evidence in the P.R.C., this unevenness skews the U.S. trial in favor of the prosecution, infringing on criminal defendants' Sixth Amendment rights of compulsory process.¹⁴⁶ The defendant's limited access to foreign evidence, in turn, increases the need to confront U.S. government witnesses. In light of widely reported practice of coercion in the P.R.C.,¹⁴⁷ a defendant in a U.S. proceeding may not be able to adequately cross-examine

¹⁴³ The CPL reshaped procedures to introduce more substantive elements of an adversarial system regarding to arrest and detention, defense counsel, initiation of prosecution, and trial proceedings. See HECHT, *supra* note 22, at 77. For many commentators, this reform remains questionable in light of international and American rights-based standards. See CLARKE, *supra* note 117, at 65-67 (1998). But cf. R.P. Peerenboom, *What's Wrong with Chinese Rights?: Toward a Theory of Rights with Chinese Characteristics*, 6 HARV. HUM. RTS. J. 29, 36-38, 57 (1993) (arguing that human rights advocates in the West should not impose notions of human rights developed from the same epistemology underlying the history of liberal democracy founded on individual rights). It should be emphasized that U.S. constitutional protections for criminal defendants did not dramatically expand until the Warren era of the 1960s. See Magulis-Ohnuma, *supra* note 100, at 151. The purpose of presenting Chinese criminal law and procedure in such a critical light is not to duplicate a human rights critique of the system available elsewhere. E.g., HUMAN RIGHTS IN CONTEMPORARY CHINA, (R. Randall Edwards, ed. 1986). Critical treatment is included here to demonstrate potential problems, which necessarily come into play due to the obligations under the U.S.-P.R.C. MLAA, when judicial cooperation with such a criminal justice system as the P.R.C.'s is squared with the high standards of the U.S. Constitution.

¹⁴⁴ See discussion *infra* Part V.A. Article 9 of the CPL Implementation Provisions defines state secrets as "cases whose details or nature involves state secrets." Provisions Concerning Several Issue in the Implementation of the Criminal Procedure Law (promulgated Jan. 19, 1998 by the Supreme People's Court, Supreme People's Procuratorate, Public Security Ministry, State Security Ministry, Justice Ministry, and Legal System Working Committee of the National People's Congress Standing Committee) (1998) (P.R.C.) art. 9, translated in LUO, *supra* note 141, at 133 [hereinafter CPL Implementation Provisions].

¹⁴⁵ As noted, the U.S.-P.R.C. MLAA expressly bars defendants from requesting evidence through the streamlined MLAA procedure. See U.S.-P.R.C. MLAA, *supra* note 1, art. I (3).

¹⁴⁶ See discussion *infra* Part V.A.

¹⁴⁷ See Wang v. Reno, 837 F. Supp. 1506, 1512-13 (N.D. Cal. 1993), *aff'd*, 81 F.3d 808 (9th Cir. 1996).

a witness in Chinese custody, as is guaranteed under the Confrontation Clause of the Sixth Amendment.¹⁴⁸ The threat of coercion may stifle truthfulness¹⁴⁹ even if formal requirements for taking foreign depositions are met under the Federal Rules of Criminal Procedure and current applicable doctrine among the U.S. circuit courts.¹⁵⁰

A. *The Compulsory Process Clause of the Sixth Amendment*

The unreliability of the letters rogatory process and the difficulty of procuring Chinese witnesses in U.S. court to testify in favor of the defendant is problematic under the Compulsory Process Clause of the Sixth Amendment. The Sixth Amendment to the U.S. Constitution provides that “[i]n all criminal proceedings, the accused shall enjoy the right to compulsory process for obtaining witnesses in his favor[.]”¹⁵¹ In cases within U.S. territory, the U.S. Supreme Court has recognized this right in order to strike down a state’s application of its evidence rules that impair the criminal defendant’s capacity to present witnesses.¹⁵² This right to compulsory process is limited, however, to the extent that it is “within the power of the federal government to provide it.”¹⁵³ Although the U.S. Supreme Court has not passed on the core constitutional issue in the MLAT context,¹⁵⁴ in rare instances, federal courts have invoked their supervisory powers to order the DOJ to obtain evidence on behalf of defendants through MLAT procedural channels under Rule 15 of the Federal Rules of Criminal Procedure (“Rule 15”).¹⁵⁵

In *United States v. Sindona*, a federal district court directed the DOJ to request evidence on a defendant’s behalf pursuant to the U.S.-Switzerland MLAT, which was silent on rights of “private persons,” under threat that the

¹⁴⁸ See discussion *infra* Part V.B.

¹⁴⁹ E.g., *Wang*, 837 F. Supp. at 1512-14.

¹⁵⁰ See discussion *infra* Section V.B.2.

¹⁵¹ U.S. CONST. amend. XI.

¹⁵² See, e.g., *Chambers v. Mississippi*, 410 U.S. 284, 299 (1973) (striking down state hearsay exception for statements against interest that permitted statements against pecuniary interest, but barred statements against penal interest); *Washington v. Texas*, 388 U.S. 14, 16 (1967) (invalidating state evidence rule that disqualified accomplices as witnesses for defense, but not for the prosecution). See generally Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978).

¹⁵³ *United States v. Greco*, 298 F.2d 247, 251, (2d Cir. 1962), cert. denied, 39 U.S. 820 (1962).

¹⁵⁴ See ABBELL, *supra* note 15, § 2-2, at 4. But see *Mancusi v. Stubbs*, 408 U.S. 204, 211-12 (1972) (relying on defunct federal law that did not permit state courts to compel witnesses from abroad).

¹⁵⁵ See ABBELL, *supra* note 15, § 2-2, at 5. In exceptional circumstances, a court can require that testimony of a prospective witness be taken and preserved for use at trial under FED. R. CRIM. P. 15 (“Rule 15”). See *United States v. Des Marteau*, 162 F.R.D. 364, 372 n.5 (M.D. Fla. 1995).

case would be dismissed with prejudice if the government refused.¹⁵⁶ Similarly, in *United States v. Des Marteau*, once the court signaled its intent to issue a Rule 15 order, the DOJ volunteered the use of the U.S.-Canadian MLAT to take testimony of witnesses abroad pursuant to the defendant's motion.¹⁵⁷ According to Micheal Abbell, a prominent criminal defense attorney and former head of the OIA, "if the DOJ were to refuse to use an MLAT to execute a Rule 15 court order authorizing a defendant to obtain evidence from abroad, that denial would appear to violate the defendant's rights under the Compulsory Process clause of the Sixth Amendment."¹⁵⁸

The *Sindona* and *Des Marteau* courts skirted the direct constitutional issue and instead required U.S. prosecutors to obtain evidence on the defendants' behalf pursuant to Rule 15 through the MLAT procedural channels.¹⁵⁹ While these courts compelled the DOJ to afford criminal defendants fundamental fairness under the Fifth and Sixth Amendments, invocation of federal supervisory power was entirely discretionary.¹⁶⁰ The Senate Foreign Relations Committee has offered only that "nothing in [MLATs] is intended to negate the authority to ask the prosecution to make requests for information under [MLATs]."¹⁶¹ The Senate, therefore, has not further questioned defendants' limited access to evidence through MLATs.

The options available to the defendant in the Chinese context are: (1) to petition the trial court with a Rule 15 motion to direct the DOJ to request depositions of a Chinese witnesses or the production of physical evidence; or (2) to seek directly through letters rogatory the evidence from the P.R.C. Ministry of Justice ("MOJ").¹⁶² In both cases, the defendant faces dual hurdles in obtaining exculpatory evidence. First, absent an MLAA provision for a defendant's affirmative right to request evidence necessary for his

¹⁵⁶ See *In re Sindona*, 450 F. Supp. 672 (S.D.N.Y. 1978) (noting the US-Switzerland MLAT was silent on the rights of "private persons"). See also *United States v. Filippi*, 918 F.2d 244, 246-48 (1st Cir. 1990) (upholding the trial court's authority to order the U.S. Attorney to request Special Interest Parole from the Immigration and Naturalization Service for a Filipino witness for purposes of testifying for a defendant).

¹⁵⁷ *Des Marteau*, 162 F.R.D. at 370-72.

¹⁵⁸ Abbell, *supra* note 100, at 22.

¹⁵⁹ See ABBELL, *supra* note 14, § 2-2, at 5. Upon a motion by the government or defendant, in exceptional circumstances, the court, under FED. R. CRIM. P. 15, can require testimony of a prospective witness to be taken and preserved for use at trial. See *Des Marteau*, 162 F.R.D. at 372 n.5.

¹⁶⁰ See, e.g., *Sindona*, 636 F.2d at 802; *Filippi*, 918 F.2d at 247. See also ABBELL, *supra* note 14, § 2-2, at 5.

¹⁶¹ S. EXEC. REP. NO. 8, at 5 (1989).

¹⁶² See Supreme People's Court Interpretations Concerning Several Issues in the Implementation of the Chinese Procedure Law of the People's Republic (promulgated by the Supreme People's Court of the People's Republic of China) Legal Interpretation No. 23, art. 325-336 [1998] ("Procedures for Adjudicating Criminal Cases Involving Foreign Elements"), translated in LUO, *supra* note 141, at 245-249 [hereinafter SPC Interpretations]. See also CPL, *supra* note 141, art. 17 n.27, at 46.

defense, discretionary DOJ requests to obtain evidence on behalf of the defendant are insufficient to consistently vouchsafe compulsory process rights. Indeed, de facto recognition of compulsory process rights pursuant to Rule 15 orders are expressly contrary to the U.S.-P.R.C. MLAA's scope excluding "private persons."¹⁶³

A second, more significant hurdle to obtaining exculpatory evidence is the Chinese court system itself. Under Article 17 of the CPL, defendants using the letters rogatory process are automatically referred to the MOJ for procuring witnesses, depositions, or other physical evidence.¹⁶⁴ Once a defendant has petitioned a U.S. court to request the Department of State to issue letters rogatory pursuant to 28 U.S.C. §1781,¹⁶⁵ Article 329(1) of the Supreme People's Court Interpretation of the CPL ("SPC Interpretations") requires that an American consular official deliver the document to the Counseling Division of the Ministry of Foreign Affairs, which in turn forwards the request to the "higher people's court" involved.¹⁶⁶ After review, "and if the higher people's court deems that it can serve the documents for the foreign court," the defendant's request is fulfilled, and the documents circulate in reverse for actual issuance in the U.S.¹⁶⁷ If, however, the higher court determines that the request "is in contradiction with the sovereignty, security, or social public interests" of the state, it will be denied.¹⁶⁸ Even if the P.R.C. does not invoke the state secrets exception, the process is time-consuming. In fact, the DOJ itself acknowledges the inefficiency of letters rogatory, noting that even in favorable circumstances, and dealing with countries not as guarded as the P.R.C., issuance of evidence can take up to one year.¹⁶⁹

Under Article 325 of the SPC Interpretations, "a foreign court's request [that] is in contradiction with sovereignty, security or special public

¹⁶³ See U.S.-P.R.C. MLAA, *supra* note 1, art. I(3).

¹⁶⁴ CPL, *supra* note 141, art. 17, at 46. Under CPL, art. 17, matters of international judicial assistance are to be deferred to "China's judicial organs," which, as stipulated in the US-China MLAA, is the MOJ. U.S.-P.R.C. MLAA, *supra* note 1, art. II(2).

¹⁶⁵ 28 U.S.C. § 1781 ("Transmittal of letter rogatory or request").

¹⁶⁶ See SPC Interpretations, *supra* note 162, art. 329(1) at 247 (noting that all cases involving "foreign elements" are referred to the higher people's court for adjudication). In the P.R.C., judicial deliberation is open to influence from the procuracy, Communist Party functionaries, and senior judges of the Adjudication Committee, a body attached to the court which meets secretly to consider the correctness of judgments. LUBMAN, *supra* note 23, at 261-64. "Difficult" or "complex" cases are often referred to a court's Adjudication Committee. *Id.* at 166-67.

¹⁶⁷ *Id.* at 246.

¹⁶⁸ *Id.* art. 325(2), at 245.

¹⁶⁹ See UNITED STATES DEPT. OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, § 9-13.521(B) (1988) (informing prosecutors they should "count on as much as a year or more to obtain evidence abroad pursuant to letters rogatory").

interest . . . shall be rejected."¹⁷⁰ With striking circularity, Article 9 of the CPL Implementation Provisions defines "state secrets" as "cases whose details or nature involves state secrets."¹⁷¹ With its shield of this "state secrets" exception,¹⁷² commentators note that the notions of "state secrets" and "security" have been construed broadly to encompass many contexts,¹⁷³ especially those that might involve external interference.¹⁷⁴ For this reason, inquiry into the practices and conditions of the Chinese criminal justice system often chafes against the Chinese inclination to guard state secrets and sovereignty.¹⁷⁵ In light of this sensitivity, the MOJ could deny assistance pursuant to a letters rogatory request citing the "state's secrets" provision for a wide array of issues that might arise in a criminal matter. Because of this series of discretionary hurdles, in many cases the criminal defendant will have no recourse to obtain exculpatory evidence from the P.R.C.

General constraints on defendants' and defense attorneys' access to witnesses in the P.R.C. for investigative purposes compounds this problem. Article 325 of the SPC Interpretations is silent with regard to the ability of a defendant from the United States, through local counsel, to conduct informal investigations in a criminal matter.¹⁷⁶ In any case, under Article 37 of the CPL, a defendant can collect statements only with the witness's consent.¹⁷⁷ It is impossible to compel testimony from non-consenting private third parties unless the defendant successfully petitions the procuratorate to subpoena the witness on the defendant's behalf.¹⁷⁸ Unlike the unlimited

¹⁷⁰ SPC Interpretations, *supra* note 162, art. 325, at 245.

¹⁷¹ CPL Implementation Provisions, *supra* note 144, art. 9, at 133.

¹⁷² See generally Timothy A. Galatt, *Recent Development: The New State Secrets Law*, 22 CORNELL INT'L L. J. 255 (1989). See also HECHT, *supra* note 22, at 41.

¹⁷³ See China: *Whose Security?* "State Security" in *China's New Criminal Code, Human Rights* CHINA AND HUMAN RIGHTS WATCH/ASIA, app. B, 50-52, 102-13 (Apr. 1997) [hereinafter *China: Whose Security?*].

¹⁷⁴ See H. L. Fu & Richard Cullen, *Hong Kong and China: The 1997 Transition: National Security Law in China*, 34 COLUM. J. TRANSNAT'L L. 449, 453 (1996).

¹⁷⁵ See *Wang v. Reno*, 837 F. Supp. 1506, 1514, 1542 (N.D. Cal. 1993), *aff'd*, 81 F.3d 808 (9th Cir. 1996) (citing Prof. Robert Berring, expert witness, who noted extreme Chinese sensitivity about foreign criticism of its legal system, and a Chinese official who decried the equitable relief granted to Wang as "wanton encroachment on China's sovereignty"). See also Daniel C. Turack, *The New Chinese Criminal Justice System*, 7 CARDOZO J. INT'L & COMP. L. 49, 50-51 (1999) (noting that the P.R.C. government regards the actual number of executions, which exceeded all other countries combined in the 1990's, as a state secret).

¹⁷⁶ *But cf.* SPC Interpretations, *supra* note 162, art. 320, at 244 (providing for "power of attorney sent by foreigner, who resides outside the territory of the People's Republic of China, to a Chinese lawyer . . . shall be become legally effective after the power of attorney is notarized by a notary organ of the foreign country, or the foreign affairs department of the foreign country, and also a Chinese embassy or counselor general to the foreign country").

¹⁷⁷ CPL, *supra* note 141, art. 37, at 55.

¹⁷⁸ *Id.*

subpoena power enjoyed by the procuratorate,¹⁷⁹ U.S. defendants, as represented by local counsel, have no independent subpoena power to take witness statements. By contrast, the Chinese procuratorate's unlimited access to evidence is available to U.S. Attorneys.¹⁸⁰ The reach of U.S. Attorneys therefore is potentially unlimited: if the MOJ grants an MLAA request, Chinese procuratorates can obtain any physical evidence and compel any witness to testify under Article 45 of the CPL.¹⁸¹

B. *The Confrontation Clause of the Sixth Amendment*

Without adequate independent access to witnesses and physical evidence, the opportunity of the defense to confront government witnesses is crucial. This barrier has broader implications in the U.S.-P.R.C. MLAA context due to the strictness of the Sixth Amendment.¹⁸² In the event that MPS authorities were unwilling to transfer prisoners like Wang to testify in U.S. courts, the DOJ could decide to depose a Chinese witness pursuant to Article 9(3) of the U.S.-P.R.C. MLAA and Rule 15 whereby out-of-court statements are deemed admissible as former testimony hearsay exceptions.¹⁸³ In these same cases, however, the widely acknowledged practice of coercion among Chinese defendants and prisoners may undermine the opportunity for defense counsel to reliably cross-examine a Chinese witness under scrutiny of the MPS.

To remedy the difficulty in gathering admissible witness testimony in criminal cases involving transnational crime, Congress authorizes U.S. Attorneys and criminal defendants to take depositions abroad under 18 U.S.C. § 3503 and Rule 15.¹⁸⁴ The parties are authorized to take depositions

¹⁷⁹ *Id.*

¹⁸⁰ See, e.g., *id.*, art. 89, at 76 (providing for collection of "all evidence concerning criminal suspects regardless of whether such evidence will prove [guilt]"); CPL, *id.*, art. 92, at 77 (providing for the power to summon criminal suspect and question up to twelve hours without arrest); CPL, *id.*, art. 98, at 79 (providing obligatory witness testimony under penalty of providing false testimony or concealing criminal evidence); CPL, *id.*, art. 110, at 81 (obligating citizens to hand over physical evidence to public security organs).

¹⁸¹ See *id.*, art. 45, at 57 (authorizing P.R.C. authorities to collect evidence and take testimony from all Chinese citizens).

¹⁸² See discussion *infra* Part V.C.

¹⁸³ See FED. R. CRIM. P. 15; FED. R. EVID. 804(b)(1).

¹⁸⁴ Prior to 1975, Rule 15 only authorized defendants to take depositions in criminal cases. In 1970, Congress enacted Title VI of the Organized Crime Control Act, which eventually became 18 U.S.C. § 3503, in an attempt to eliminate what it viewed as an omission in Rule 15. See *United States v. Sines*, 761 F.2d 1434, 1438 n.5 (1st Cir.1985). Section 3503 authorized the government to take depositions in cases in which the Attorney General or his designee certifies that the defendant "is believed to have participated in an organized criminal activity." 18 U.S.C. § 3503(a) (1982). In 1974, Rule 15 was amended to expand the government's authority to take depositions to all criminal actions. The language used in the revised rule is

"whenever due to exceptional circumstances . . . it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved."¹⁸⁵ Furthermore, 18 U.S.C. § 3503 and Fed. R. Crim. P. 15 provide that whenever a deposition is taken at the behest of the government, a defendant not in custody and/or his attorney shall have the right to be present at the examination.¹⁸⁶ Both provisions state that a defendant's "failure, absent good cause shown, to appear [at a deposition] after notice and tender of expenses . . . shall constitute a waiver of [his] right [to be present] and of any objection to the taking and use of the deposition based upon that right."¹⁸⁷ Finally, Fed. R. Crim. P. 15(e) provides that depositions "may be used as substantive evidence if the witness is unavailable . . ."¹⁸⁸

Evidence-gathering abroad pursuant to Rule 15 must comport with the Confrontation Clause of the Sixth Amendment.¹⁸⁹ Under the Confrontation Clause "[i]n all criminal proceedings, the accused shall have the right to be confronted with the witnesses against him[.]"¹⁹⁰ U.S. courts have not interpreted this clause rigidly in the international context, because to do so would completely vitiate the purpose of agreements on mutual legal assistance in criminal matters.¹⁹¹ Although courts have cautioned that in the international context "the right to confrontation is not absolute,"¹⁹² the "indicia of reliability" of the Confrontation Clause, enunciated in *Green v. California*, persist.¹⁹³ These are: (1) to ensure that the witness testifies under oath; (2) to force the witness to undergo cross-examination; and (3) to

borrowed in part from § 3503, except that there is no requirement that the government certify the case as involving organized crime figures. See FED. R. CRIM. P. 15 advisory committee's note, 1974 Amendment; *United States v. Tunnell*, 667 F.2d 1182, 1187 (5th Cir. 1982).

¹⁸⁵ 18 U.S.C. § 3503(a); FED. R. CRIM. P. 15(a).

¹⁸⁶ 18 U.S.C. § 3503(b)-(c); FED. R. CRIM. P. 15(b)-(c) (providing that the expenses of travel and subsistence of the defendant and his attorney for attendance shall be paid by the government).

¹⁸⁷ 18 U.S.C. § 3503(b); FED. R. CRIM. P. 15(b).

¹⁸⁸ FED. R. CRIM. P. 15(e). FED. R. EVID. 804(a) provides in pertinent part that a witness is "unavailable" for a given hearing, if "he . . . is absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means . . . [and] if his . . . absence is [not] due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing [him] from attending or testifying." Additionally, a witness will be considered "unavailable" if he is exempted by court order on the ground of immunity concerning the subject matter of the declarant's statement, or if he persists in refusing to testify despite a court order. See FED. R. EVID. 804(a)(1-2).

¹⁸⁹ See *United States v. McKeeve*, 131 F.3d 1, 11 (1st Cir. 1997); *United States v. Walker*, 1 F.3d 423, 428-29 (6th Cir. 1993); *Sines*, 761 F.2d at 1441.

¹⁹⁰ U.S. CONST. amend. 9.

¹⁹¹ See ABBELL, *supra* note 15, §2-1, at 2.

¹⁹² *McKeeve*, 131 F.3d at 12. But cf. *United States v. Drougal*, 1 F.3d 1546, 1551 (11th Cir. 1993) (underscoring that deposition testimony is generally disfavored because it diminishes the defendant's right to confrontation).

¹⁹³ See *Sines*, 761 F.2d at 1441 (upholding Sixth Amendment comportment during deposition taken in Thailand) (quoting *California v. Green*, 399 U.S. 149, 158 (1970)).

permit the jury to observe the demeanor of the witness.¹⁹⁴ In criminal proceedings involving *ex parte* testimony (by a foreign national), the Confrontation Clause is therefore not violated: (1) where the prosecution could demonstrate its good faith inability and lack of negligence to procure the presence of the witness at trial,¹⁹⁵ or (2) when an opportunity for effective cross-examination was afforded to the defendant during the deposition taken abroad.¹⁹⁶

While the Confrontation Clause and hearsay exceptions furnish similar protections against prejudice to the defendant, the overlap is not complete.¹⁹⁷ In squaring the two protections, the Court in *Ohio v. Roberts* suggested that the former testimony's "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."¹⁹⁸ The key hearsay exception with respect to foreign depositions is FRE 804(b)(1), which pertains to former testimony.¹⁹⁹ Courts have not found the opportunity to cross-examine deficient where the witness was represented by counsel and testified at a preliminary hearing in a disinterested court.²⁰⁰ Although the *Green* Court did not conclusively define "opportunity,"²⁰¹ its most forceful formulation of "an opportunity" to cross-examine was that prior statements are admissible if "given under circumstances closely approximating those that surround a typical trial"²⁰² such that cross-examination be "full and effective."²⁰³ In the context of foreign depositions, courts have upheld the admissibility of videotaped

¹⁹⁴ *Id.*

¹⁹⁵ *McKeeve*, 131 F.3d at 12-13 (noting that such good-faith efforts need not be "heroic" as long as "reasonable alternative measures can adequately preserve the values that underpin the defendant's confrontation rights").

¹⁹⁶ See, e.g., *id.* at 13; *Sines*, 761 F.2d at 1441. *United States v. Gifford*, 892 F.2d 263, 264 (3rd Cir. 1989), cert. denied, 497 U.S. 1006 (1990) (defendant was linked to deposition in Belgium through two telephone lines, to be able to listen to the testimony by virtue of an open telephone line, and simultaneously be able to confer with his attorney through the use of a private line).

¹⁹⁷ See *Green*, 399 U.S. at 155-56 (noting the historical impetus of the right to confrontation stemmed from a dissatisfaction with trying defendants based solely on *ex parte* testimony). See also *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

¹⁹⁸ *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). See also *McKeeve*, 131 F.3d at 13.

¹⁹⁹ Under FED. R. EVID. 804(b)(1), former testimony does not fall within a hearsay exception unless: "[t]estimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

²⁰⁰ See *Roberts*, 448 U.S. at 70-71; *Green*, 399 U.S. at 165.

²⁰¹ In dicta, Justice Brennan suggested that "perhaps . . . [a] mere face-to-face encounter is sufficient" to satisfy confrontation. *Green*, 399 U.S. at 200 (Brennan, J., dissenting). But cf. *Roberts*, 448 U.S. at 70 (declining to address this suggestion raised by the *Green* Court with respect to whether the "mere" opportunity to cross-examine rendered the prior testimony admissible).

²⁰² *Green*, 399 U.S. at 165.

²⁰³ *Id.* at 158.

depositions²⁰⁴ and accurate transcripts as adequate alternative means of preserving witness demeanor for the jury.²⁰⁵

In the Chinese context, the opportunity to cross-examine required under 804(b)(1) may be deficient even if the traditional "indicia of reliability" under *Green*²⁰⁶ are formally present. Despite Chinese criminal procedure reforms, individuals remain subject to coercive police practices while in custody.²⁰⁷ The witness is susceptible to coercion should P.R.C. authorities seek to influence the witness' testimony in a manner that suits Chinese policy.²⁰⁸ Following the admission by the Chinese witness in *Wang* that MPS coercive practices had shaped his testimony, it is foreseeable that the Chinese authorities would be reluctant to send any witness to the U.S. who might, inadvertently or otherwise, compromise state security.²⁰⁹ Though the facts of *Wang* emerged in 1993, the latest U.S. Department of State *Country Report on Human Rights Practices: China* notes various reports of the on-going practice of torture, coerced confessions, and mistreatment of arrestees, detainees and prisoners by the MPS and other police and security agencies.²¹⁰

If the U.S. government cannot procure the Chinese witness, under *McKeeve*, it must provide for effective cross-examination of the deponent

²⁰⁴ See e.g., *Walker*, 1 F.3d at 428-29 (holding no violation of confrontation where defendants refused to travel to Japan due to likelihood of foreign prosecution, and where defendants' attorneys were present to cross-examine witness during videotaped deposition); *Sines*, 761 F.2d at 1441-42 (holding no Sixth Amendment violation when U.S. defense counsel was present in Thailand for deposition at U.S. government expense, and defendant refused to travel to personally confront deponent/co-conspirator for fear of Thai indictment for heroin smuggling).

²⁰⁵ See e.g., *McKeeve*, 131 F.3d at 17-18 (finding no infringement on right to confrontation when British witness refused to testify in the United States, and where the defendant's attorney was present in United Kingdom during deposition with telephonic link to U.S. defendant and trained British judicial officer recorded verbatim transcript); *United States v. Salim*, 664 F. Supp. 682, 685-89 (E.D.N.Y. 1987) (finding sufficient guarantees of trustworthiness when, pursuant to French law, French judge conducted questioning of the witness, had the examination recorded using French and Farsi interpreters in a less than verbatim transcript, and permitted the non-French-speaking U.S. Court Reporter to observe deposition).

²⁰⁶ *Green*, 399 U.S. at 158.

²⁰⁷ See *HECHT*, *supra* note 22, at 54 (stating that the limited availability of counsel under CPL creates ample risk of coerced "confessions"). Although coerced statements are forbidden under CPL, art. 43, the statute neither explicitly provides for sanctions nor imposes an exclusionary rule for involuntary statements or physical evidence illegally seized. For legislative history of CPL, see *LUO*, *supra* note 141, at 24.

²⁰⁸ E.g., *Wang v. Reno*, 837 F. Supp. 1506, 1512-13 (N.D. Cal. 1993), *aff'd*, 81 F.3d 808 (9th Cir. 1996) (describing torture of Wang). Wang is further described as being flanked by MPS agents during interview with DEA agents who were present without U.S. translator. *Id.* at 1521.

²⁰⁹ In *Wang*, the apparently sensitive information that the MPS authorities feared Wang would leak by testifying truthfully was the source of the heroin from inside P.R.C. territory. See *Wang*, 837 F. Supp. at 1513.

²¹⁰ See U.S. DEPT. OF STATE COUNTRY REPT. ON HUMAN RIGHTS PRACTICES: CHINA, sec. 1(c) ("Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment") (2001) available at www.state.gov/g/drl/rls/hrrpt/2001/cap/8289.htm (last visited Jan.29, 2003) [hereinafter U.S. DEPT. OF STATE P.R.C. COUNTRY REPT.].

rule.²¹¹ Article 9(3) of the U.S.-P.R.C. MLAA permits the taking of depositions "in a manner agreed to by the Requested Party insofar as not contrary to the laws of the Requested Party."²¹² If the P.R.C. is the Requested Party, under its laws the MOJ could stipulate that MPS agents monitor each observation,²¹³ especially as P.R.C. authorities often regard external inquiry into the criminal justice system as implicating national security.²¹⁴ In addition to official sensitivity about foreign interference, corruption itself might motivate certain MPS or other police officers to ensure that a Chinese witness testified in a certain way.²¹⁵

If the deponent is a defendant in a related Chinese criminal matter, and testified favorably according to Chinese policy considerations, MPS authorities would be in a position to grant leniency to the deponent-defendant, prior to commencement of the prosecution.²¹⁶ More important, the MPS would have advanced notice of the nature of the request, though not necessarily a copy of the interrogatories, with which to steer the responses of the witness under their control.²¹⁷ Even if videotaped, as in

²¹¹ See *McKeeve*, 131 F.3d at 13.

²¹² U.S.-P.R.C. MLAA, *supra* note 1, art. IX(3).

²¹³ P.R.C. officials retain considerable discretionary authority to block attorney access and monitor attorney-client meetings. See *HECHT*, *supra* note 22, at 41 (noting an expansive definition of "state secrets" in China). Under CPL, *supra* note 141, art. 96, a state functionary may be present when a defense attorney is interviewing a criminal suspect in a case involving state secrets. In the case of U.S. prosecutors and U.S. defense counsel deposing a Chinese witness in P.R.C. custody, Chinese authorities could insist that MPS observers would be warranted under SPC Interpretation, *supra* note 162, art. 325, which provides that a request "in contradiction with sovereignty, security, or social public interests."

²¹⁴ For instance, the annual number of executions in the People's Republic of China is a state secret. See *China: Whose Security*, *supra* note 173, app. B, 50-52, 102-13 (translating crimes of endangering state security, analyzing the concept of endangering state security, and examining other relevant security laws, including the State Security Law and the State Secrets Law).

²¹⁵ See *PEERENBOOM*, *supra* note 22, at 406-08 (noting multifarious forms of Chinese corruption unchecked by weak courts); *LUBMAN*, *supra* note 23, at 171 (citing reports that Chinese Communist Party members are willing to cover up offenses of fellow members). See also discussion *supra* Part II. It is also important to note that while MPS authorities in Beijing may publicly denounce such practices, the MPS is often ill-equipped to enforce sanctions against officers in the provinces. See *PEERENBOOM*, *supra* note 22, at 414-16.

²¹⁶ The "investigatory" period prior to the formal proceeding can be extended for lengthy periods to meet state needs. See, e.g., CPL, *supra* note 141, art. 69(3), at 66 (allowing for maximum of seven days before the procuratorate must authorize an official arrest); CPL, *supra* note 141, art. 127 (2)-(3), at 66 (providing for post-arrest detention for a maximum of two months pending an indictment, with the possibility of an extension of an additional two months "for crimes punishable by sentences of ten years or longer" or "involving gangs"); CPL, *supra* note 141, art. 125, at 85 (permitting supplementary investigation to extend detention for an addition month, or further indefinite delays "for certain special reasons"). See also *Wang*, 837 F. Supp. at 1514-23 (postponing commencement of formal proceeding for six months to permit Wang's travel to the United States to testify). During this pending investigation, MPS officials can use sentence reduction as incentive to testify according to policy. See *id.* at 1551.

²¹⁷ The arrangements are somewhat negotiable under U.S.-P.R.C. MLAA, *supra* note 1, art IX(3).

Sines,²¹⁸ or recorded in a verbatim transcript by a trained judicial officer as in *McKeeve*,²¹⁹ the strong potential for coercion undermines the reliability of such deposition testimony despite the demonstrable "indicia" under *Green v. California*.²²⁰ Under scrutiny of MPS officials, a deponent who struck a deal to testify falsely would be under enormous pressure to perjure himself. The choice faced by Wang—perjury and a reduced sentence versus the harshest consequences for leaking sensitive information—could be replicated in these depositions. The difference between *Wang* and these hypothetical cases would be the missing neutrality of a disinterested court to protect the witness and better enable truthfulness.²²¹

This parade of horrors is intended to emphasize the possibility that a deposition of a Chinese witness, taken in the hypothetical setting, might not meet the formal "indicia of reliability" recognized in the *McKeeve* line of foreign deposition cases.²²² Yet the circumstances of such a deposition would in no way "closely approximat[e] those that surround a typical trial [in the United States]."²²³ In the event of such unchecked untruthfulness, defendants in U.S. proceedings, though represented by counsel at depositions, might be unable to adequately confront government witnesses in the repressive atmosphere of a Chinese jailhouse. If such depositions were admitted, especially as probative of central issues, it would be a violation of the right to confrontation under the Sixth Amendment, and derivatively, due process rights under the Fifth Amendment.²²⁴

²¹⁸ *Sines*, 761 F.2d at 1441. It should be noted that courts have not necessarily required videotaping as a condition precedent for admitting foreign testimony. See, e.g., *McKeeve*, 131 F.3d at 17-18 (holding that video recording was not necessary for purposes of confrontation especially when the host country prohibits taping); *Salim*, 664 F. Supp. at 691-92 (finding sufficient observation of witness demeanor by a non-French-speaking U.S. Court Reporter).

²¹⁹ *McKeeve*, 131 F.3d at 17-18.

²²⁰ *Green*, 399 U.S. at 158 (citing factors of witness's oath, opportunity to cross-examine, and a jury's ability to view witness demeanor).

²²¹ It would be unimaginable for a witness to respond in the affirmative to the defense counsel's question: "Were your statements here coerced?" For discussion of the sensitivity about these coercive practices, see tactical avoidance exercised by DEA agents Aiu and Swenson in negotiating the witness transfer in *Wang*, 837 F. Supp. at 1551-53.

²²² As noted, these cases featured depositions in countries that are not notorious for coercive practices, and where the presumption of fair treatment remains. See, e.g., *McKeeve*, 131 F.3d at 13 (U.K.); *Walker*, 1 F.3d at 428-29 (Japan); *Sines*, 761 F.2d at 1441-1442 (Thail.). It is also worth noting that the U.S. Supreme Court has held the trial court's failure to ensure cross-examination of a complaining witness with a motive to lie violates the defendant's Sixth Amendment rights. See *Olden v. Kentucky*, 488 U.S. 227, 232 (1988).

²²³ *Green*, 399 U.S. at 165.

²²⁴ *Id.* at 186 n.20 (citing *Simmons v. United States*, 390 U.S. 377 (1968) (excluding evidence where pretrial confrontation was so infected by suggestiveness as to give rise to an irreparable likelihood of misidentification) and *United States v. Kearney*, 420 F.2d 170 (D.C. Cir. 1969) (disallowing conviction where the critical issues at trial were supported only by *ex parte* testimony not subjected to cross-examination, and not found to be reliable by the trial judge)).

C. Possible Remedies

Criminal defense attorneys, civil libertarians, and the American Bar Association ("ABA") have decried the DOJ's failure to afford defendants access to evidence abroad through affirmative MLAT provisions.²²⁵ The ABA has proposed that every MLAT adopt the necessity standard from Fed. R. Crim. P. 15(a) and "expressly permit a criminal defendant to use the treaty [or agreement] to obtain evidence from the Requested country to use in their defense if they can make a showing of necessity to the trial court."²²⁶ The DOJ has characterized this proposition as vying for a defendant's "unfettered use of MLATs to obtain evidence abroad."²²⁷ Although "unfettered use" seems to exaggerate the ABA position,²²⁸ the DOJ's response that it has "approved" and "volunteered" use of MLAT pursuant to Rule 15 motions granted to the defendant, as in *Des Marteau*, is the most persuasive response to these criticisms.²²⁹

Affording a defendant equally efficient access through the U.S.-P.R.C. MLAA removes some barriers to gathering evidence abroad. More important, it circumvents the predictably time-consuming process of letters rogatory. This corrects the imbalance in evidence-gathering capacity that currently flaws the agreement. The defendant could invoke the authority of the MLAA to extend subpoena power via Chinese procuratorates²³⁰ to interview witnesses, gather bank and business records, and request directly

²²⁵ See Abbell, *supra* note 100, at 21. In 1988, the National Association of Criminal Defense Lawyers, Criminal Section of the American Bar Association, and the American Civil Liberties Union formed an ABA House Delegation to voice these concerns before the Senate Foreign Relations Committee, which was considering the ratification of six MLATs. *Id.* See also NADELMANN, *supra* note 12, at 471; Zagaris & Resnick, *supra* note 52, at 20 (citing Abbell's testimony that "it was neither fair nor consistent with the compulsory process clause . . . to require defendants to continue to rely on letters rogatory when prosecutors had available the advantages of the MLAT").

²²⁶ See Abbell, *supra* note 100, at 21 (quoting ABA CRIMINAL JUSTICE SECTION REPT. NO. 109 (1989)). FED. R. CRIM. P. 15(a) requires that the defendant demonstrate that "due to exceptional circumstances of the case it is in the interest of justice" that deposition testimony or physical evidence be obtained abroad. See also *Drogoul*, 1 F.3d 1546 (1st Cir. 1993) (holding that a party requesting Rule 15 order bears the burden of persuasion as to necessity).

²²⁷ See S. EXEC. REP. NO. 24, at 10 (2d Sess. 1996) [hereinafter AUSTRIAN REPORT]. The DOJ also claims that an affirmative MLAT provision affording defendant access (1) would deter countries from entering into MLATs with the U.S., (2) would be unnecessary because defendants have greater access to evidence than the government, (3) would be redundant because defendants already have access pursuant to letters rogatory, (4) that government itself does not have compulsory process, and thus the defendant's parallel right cannot be denied, and (5) "no court has adopted the legal reasoning" to support a core constitutional critique under the compulsory clause. See *id.* at 9-11.

²²⁸ See Abbell, *supra* note 100, at 22.

²²⁹ See, e.g., *Des Marteau*, 162 F.R.D., at 372 n.5; AUSTRIAN REPORT, *supra* note 227, at 11.

²³⁰ See CPL, *supra* note 141, art. 45, at 57 (providing for unlimited authority to collect evidence from P.R.C. citizen).

any other physical evidence held by Chinese authorities. If the defendant could then satisfy the many hearsay exceptions under FRE 803 and 804, this evidence would be admissible at trial.²³¹ In cases where coercion might be present, the defendant could request the transfer of the Chinese witness to the United States to testify. Even if the MOJ denied the defendant assistance, it would still be obligated to justify the denial to the Central Authority and, by inclusion, the defendant.²³² Finally, this increased independence would allow the defendant to be more vigilant against prosecutorial misconduct evinced in the *Wang* case.²³³ Accordingly, fairer trials in the United States would result.

Such an express provision might also have policy ramifications. By incorporating the necessity standard of Rule 15 expressly into the U.S.-P.R.C.-MLAA, as proposed by the ABA Delegation,²³⁴ the U.S. government could impart a policy that includes a dimension of individual legal rights into the binding U.S.-P.R.C. MLAA. Under SPC Interpretation 326 of the CPL, moreover, P.R.C. authorities would be obligated to produce evidence pursuant to the U.S.-P.R.C. MLAA.²³⁵ Such an approach would be different from usual criticisms of the Chinese criminal justice system, which emphasize the lack of protections for criminal defendants under a rights-based standard.²³⁶ By engaging with the P.R.C., the United States could appeal to the pragmatic interests of crime control served by the MLAA, while also attaching the necessary condition of equal access to evidence and witness statements that are not suspect as fruits of coercion. The U.S.-P.R.C. MLAA's forfeiture provision²³⁷ would sweeten the inducement to uphold such constitutional standards while promoting crime control.

²³¹ See, e.g., FED. R. EVID. 803 (1-23) ("Hearsay Exceptions; Availability of Declarant Immaterial") FED. R. EVID. 804(B)(1-4) ("Hearsay Exceptions; Declarant Unavailable").

²³² See U.S.-P.R.C. MLAA, *supra* note 1, art. III(3) (requiring notice to requesting party, with reasons for denial of assistance).

²³³ See *Wang*, 837 F. Supp. at 1553-58.

²³⁴ See FED. R. CRIM. P. 15. See also Abbell, *supra* note 100, at 21 (citing ABA resolution). Modifications are permitted under the U.S.-P.R.C.-MLAA. U.S.-P.R.C.-MLAA, *supra* note 1, art. XXIII(1) (stating that after three years in force the agreement shall renew every successive five years, unless either party notifies within six months of the period's termination its desires to enter into consultations to modify the agreement).

²³⁵ See SPC Interpretations, *supra* note 162, art. 326 at 246. But see U.S.-P.R.C. MLAA, *supra* note 1, art. III(1)(c) (designating that requests that "would prejudice the sovereignty, security, public order (ordre publique), important public policy or other essential interests of the Request Party" may be denied).

²³⁶ See U.S. DEPT. OF STATE P.R.C. COUNTRY REPT., *supra* note 210.

²³⁷ See U.S.-P.R.C. MLAA, *supra* note 1, art. XVI (providing mutual assistance in forfeiture proceedings).

VI. CONCLUSION

The dramatic increase in crime in the P.R.C. has direct impact on the United States as organized transnational groups expand markets beyond Chinese borders. The U.S. government has a legitimate interest in stemming the flow of narcotics, aliens, and other contraband across its borders. The U.S.-P.R.C. MLAA is an effective response to the globalization of criminality from the P.R.C. Given the MLAT in place with Hong Kong, it serves to close the gap in broadening the procedural framework for cooperative prosecution in East Asia.

The political offense exception of the U.S.-P.R.C. MLAA anticipates differing values in substantive criminal law and enforcement.²³⁸ By expressly limiting the scope of the U.S.-P.R.C. MLAA, the United States insulates itself from direct complicity in prosecuting political offenses considered repugnant under the U.S. system of law. It also serves a progressive purpose in refusing to cooperate with this dimension of Chinese criminal law enforcement. Under Nadelmann's rubric, this deliberate forbearance effects a de-harmonization between the U.S. and Chinese criminal justice systems.²³⁹

The impact of this enhanced prosecutorial power, however, may endanger the criminal defendant's Sixth Amendment and due process rights in U.S. proceedings. Without providing the defendant access to evidence in the P.R.C., the effectiveness in streamlining prosecutorial assistance under the U.S.-P.R.C. MLAA tilts the balance of adversarial forces in a U.S. trial in favor of the prosecution, infringing upon the defendant's rights of the compulsory process. Absent an express MLAA provision for defendants, or better DOJ assurances that requests for evidence will be vigorously made to the Chinese MOJ, ad hoc discretionary Rule 15 orders are insufficient.²⁴⁰ Worse, the default access through letters rogatory may afford the defendant no access at all. Because of the very flexible P.R.C. "state secrets" exception, concerted Sino-American prosecutorial efforts could result in the de facto inability of defendants to obtain exculpatory evidence from the P.R.C. contrary to the defendant's Sixth Amendment right to compulsory process.²⁴¹

With a defendant's independent access to evidence severely circumscribed, the opportunity to confront U.S. government witnesses in the

²³⁸ U.S.-P.R.C. MLAA, *supra* note 1, art. III(1)(d).

²³⁹ See discussion *supra* Part III.C.

²⁴⁰ See FED. R. CRIM. P. 15.

²⁴¹ See discussion *supra* Part V.A.

P.R.C. becomes crucial. Despite formally demonstrating the "indicia of reliability,"²⁴² however, a deposition taken in the P.R.C. may not substantively allow a defendant to confront a U.S. government witness in custody there. The widely acknowledged police practice of coercion among Chinese defendants and prisoners may undermine the genuine opportunity for defense counsel to reliably cross-examine a Chinese witness under scrutiny of the MPS.²⁴³ This lack of a guarantee of trustworthiness may infringe on the Sixth Amendment right to confrontation.

With a defendant's access through the U.S.-P.R.C. MLAA based upon the Rule 15 standard, the DOJ could combine an efficient exchange of evidence with constitutional safeguards. The prosecutorial reach enhanced through the MLAA could match the borderless range of transnational criminal organizations while preserving a defendant's access to exculpatory evidence. If Nadelmann is correct that MLATs are a driving force behind the "harmonization," and thus "Americanization" of international law enforcement,²⁴⁴ this process will remain incomplete until U.S. constitutional protections accompany this flexed power abroad to ensure fundamental trial fairness at home.

²⁴² See *California v. Green*, 399 U.S. 149, 158 (1970).

²⁴³ See discussion *supra* Part V.B.

²⁴⁴ NADELMANN, *supra* note 12, at 470.